

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 TEXARKANA DIVISION

4 COLTON CARICO,) (

5 PLAINTIFF,) (CIVIL ACTION NO.

6) (5:22-CV-95-RWS

7 VS.) (TEXARKANA, TEXAS

8) (

9 DEREK BRISTOW,) (DECEMBER 13, 2023

10 DEFENDANT.) (2:00 P.M.

11 MOTION FOR SUMMARY JUDGMENT HEARING

12 BEFORE THE HONORABLE ROBERT W. SCHROEDER III

13 UNITED STATES DISTRICT JUDGE

14 FOR THE PLAINTIFF: Mr. Mark V. Maguire
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19 COURT REPORTER: Ms. Shelly Holmes, CSR, TCRR
20 Official Court Reporter
Honorable Robert W. Schroeder III
21 United States District Judge
Eastern District of Texas
22 Texarkana Division
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24 (Proceedings recorded by mechanical stenography, transcript
25 produced on a CAT system.)

02:00:54 1 COURT SECURITY OFFICER: All rise.

02:00:55 2 THE COURT: Please be seated.

02:00:57 3 Mrs. Schroeder, if you would, call the case for
02:01:00 4 us.

02:01:00 5 COURTROOM DEPUTY: Case No. 5:22-CV-95, Colton
02:01:06 6 Carico versus Derek Bristow.

02:01:08 7 THE COURT: Announcements for the record?

02:01:09 8 MR. MAGUIRE: Good afternoon, Your Honor. Mark
02:01:11 9 Maguire on behalf of Colton Carico.

02:01:13 10 THE COURT: Good afternoon, Mr. Maguire.

02:01:15 11 MR. NOGA: Good afternoon, Your Honor. Darrell
02:01:17 12 Noga on behalf of Defendant Officer Bristow.

02:01:19 13 THE COURT: Good afternoon.

02:01:20 14 MR. KLEMENT: Your Honor, Christopher A. Klement,
02:01:25 15 also for Defendant Officer Bristow.

02:01:27 16 THE COURT: Hello.

02:01:28 17 Welcome to everybody. Thank you all for being
02:01:30 18 here today.

02:01:31 19 We have set for argument this afternoon the
02:01:35 20 Defendant's motion for summary judgment regarding a
02:01:39 21 qualified immunity. The motion has been briefed through a
02:01:44 22 reply. There were attachments to the motion. There were
02:01:51 23 attachments as exhibits to the response as well.

02:01:55 24 I've reviewed all of the briefing. I've reviewed
02:01:58 25 all of those attachments. Likewise, I have reviewed

02:02:02 1 multiple times Exhibits 5 and 6, I think, to the motion for
02:02:12 2 summary judgment, which are the body camera footage from
02:02:17 3 both officers involved.

02:02:20 4 And, likewise, I've reviewed a number of the cases
02:02:26 5 that the parties discuss in their briefing, most recently
02:02:33 6 the Cole versus Carson case from the Fifth Circuit.

02:02:35 7 So I feel like I am up to speed on the issues
02:02:40 8 involved in this case and this motion, and I look forward
02:02:44 9 to the parties' presentation this afternoon.

02:02:47 10 Whoever wishes to go forward on the Defendant's
02:02:50 11 motion may do so.

02:02:50 12 MR. NOGA: Thank you, Judge.

02:02:56 13 Darrell Noga on behalf of Defendant, Officer
02:02:58 14 Bristow.

02:02:58 15 Judge, some events may be tragic and yet lawful,
02:03:04 16 and that is what we have here. We have asserted qualified
02:03:08 17 immunity, and as the Court knows, qualified immunity allows
02:03:12 18 government actors to know that they're not going to be
02:03:16 19 liable as long as their actions are reasonable in light of
02:03:19 20 current law.

02:03:19 21 That leads us to a two-step analysis that the
02:03:23 22 Court has to consider.

02:03:24 23 Number one, has a constitutional or statutory
02:03:27 24 violation occurred?

02:03:28 25 Number two, was the law so clearly established

02:03:31 1 that every reasonable officer would have known the conduct
02:03:34 2 at issue was illegal at the time of the action?

02:03:37 3 Now, the question of objective reasonableness is
02:03:42 4 one of law for the Court. It is not a question for the
02:03:45 5 jury to judge in 20/20 hindsight.

02:03:48 6 Our Supreme Court has been very strict and very
02:03:51 7 consistent that in declaring whether a police officer had
02:03:54 8 fair notice that his or her conduct was unlawful, you
02:03:58 9 cannot take clearly established law at a high level of
02:04:02 10 generality. It has to be particularized to the case facts,
02:04:07 11 and the case law and precedent has to put the question
02:04:10 12 beyond doubt.

02:04:11 13 Now, I am going to be -- if the Court will indulge
02:04:14 14 me, I want to focus later on two cases. One of them, the
02:04:19 15 Wilson versus City of Bastrop case, which is a Fifth
02:04:23 16 Circuit case, 26 F.4th, 709.

02:04:28 17 THE COURT: It's in the briefing?

02:04:28 18 MR. NOGA: Yes, Your Honor.

02:04:29 19 And another one that's also in the briefing -- we
02:04:32 20 cited it multiple times because it's factually on point,
02:04:36 21 Thomas Garza v. Briones, also a Fifth Circuit case, and
02:04:39 22 that one is 943 F.3d 740.

02:04:42 23 The one case -- quite recently, Bastrop is a 2022
02:04:48 24 case from the Fifth Circuit, and Briones -- Garza v.
02:04:52 25 Briones is a 2019 case.

02:04:54 1 And, Judge, before I get to that, it's a high
02:04:56 2 burden -- I want to point out that when qualified immunity
02:04:58 3 is asserted, the burden then becomes that of Plaintiff to
02:05:03 4 overcome it and to show that the conduct was objectively
02:05:06 5 unreasonable as a matter of law in light of established
02:05:10 6 precedent.

02:05:10 7 THE COURT: Mr. Noga, can I ask you to slow down
02:05:13 8 just a little bit for me?

02:05:14 9 MR. NOGA: Sure. Absolutely, Your Honor.

02:05:15 10 I would also state that I want the Court to please
02:05:19 11 keep in mind that qualified immunity represents the norm.
02:05:23 12 That's what our U.S. Supreme Court told us in Harlow v.
02:05:27 13 Fitzgerald, 457 U.S. 800, and it's been the norm ever
02:05:32 14 since.

02:05:32 15 Now, when you apply that legal framework of
02:05:36 16 analysis to this case, Your Honor, I'm going to address why
02:05:39 17 there was no constitutional violation and why I believe
02:05:43 18 Officer Bristow should prevail on either or both prong.
02:05:47 19 Just as in the Wilson v. Bastrop case, the trial court
02:05:53 20 found both prongs favored qualified immunity, and then the
02:05:56 21 Fifth Circuit affirmed, saying there was no constitutional
02:05:58 22 violation on very similar facts and said we don't have to
02:06:01 23 reach that second prong that the District Court did.

02:06:05 24 But Officer Bristow's conduct, I'm going to argue,
02:06:08 25 was objectively reasonable as a matter of law in responding

02:06:12 1 to an angry, drunk, uncooperative man brandishing a
02:06:18 2 high-powered rifle with his finger on the trigger. I'm
02:06:21 3 going to go through the unrebutted facts and evidence at
02:06:23 4 some point in time because I think it's critical for the
02:06:26 5 Court to understand the facts and the mindset that informed
02:06:28 6 the officer's belief that there was an imminent threat to
02:06:33 7 the safety of themselves and others.

02:06:35 8 THE COURT: I don't want to sidetrack you, but I
02:06:39 9 think Officer Bristow testified that he did not know
02:06:41 10 whether his finger was or was not on the trigger; isn't
02:06:44 11 that correct?

02:06:44 12 MR. NOGA: That is correct. Officer McCraw said
02:06:46 13 his finger was on the trigger --

02:06:48 14 THE COURT: Okay.

02:06:48 15 MR. NOGA: -- and technically his thumb. Officer
02:06:52 16 McCraw testified the thumb was on the trigger, and he could
02:06:52 17 see it. And Bristow said he wasn't sure. He saw the hand
02:06:56 18 down by the trigger area. That's correct, Your Honor.

02:06:58 19 But before I do so, I do want to also call the
02:07:04 20 Court's attention that it can take any prong of that
02:07:08 21 two-prong analysis first in studying qualified immunity,
02:07:12 22 and in that case, from my argument, I believe there are
02:07:16 23 some low-hanging fruit, so to speak, in terms of the
02:07:20 24 clearly established law prong.

02:07:22 25 THE COURT: Well, I don't want to sidetrack you

02:07:23 1 here, but how does the Plaintiff characterize or articulate
02:07:27 2 the clearly established law before we get very -- very far?

02:07:31 3 MR. NOGA: Well, the Plaintiff cites Cole v.
02:07:35 4 Carson and while yet admitting in his briefing that it is
02:07:37 5 not factually on point. I can tell you that looking at the
02:07:42 6 dissents in Cole v. Carson -- and I was going to get to
02:07:46 7 that and distinguish it, Your Honor -- I think that's --
02:07:48 8 even Plaintiff in his brief -- I don't want to misstate
02:07:51 9 him, but I think he does put a line in there honestly
02:07:54 10 saying this is not factually quite on point because in Cole
02:07:58 11 v. Carson there was a factual dispute that was material as
02:08:00 12 to whether the victim was even aware of police presence.
02:08:05 13 He walked out of some bushes with a gun, and there was
02:08:08 14 dispute over when the shots were fired, what warnings were
02:08:11 15 given, and so forth.

02:08:12 16 THE COURT: So in the briefing or anywhere else,
02:08:14 17 other than citing the Cole case, is there any articulation
02:08:19 18 by the Plaintiff of what the clearly established law
02:08:22 19 involved here is?

02:08:23 20 MR. NOGA: None, Your Honor. And in fairness to
02:08:26 21 Plaintiff, that's because the cases that I just cited to
02:08:28 22 you and other cases cited in those opinions put clearly
02:08:32 23 established law to show that Officer Bristow's conduct was
02:08:35 24 lawful. Those cases involved situations where the
02:08:40 25 person -- one did not even have a gun, one where he had his

02:08:44 1 back turned to the officer and was fleeing from him. And
02:08:46 2 the Fifth Circuit -- and I will quote directly -- and if
02:08:49 3 you'll indulge me, it's important to go into some detail in
02:08:52 4 the rationale. The Fifth Circuit said we've never required
02:08:55 5 anyone to point the gun at an officer, we've never required
02:08:58 6 anyone to actually shoot the gun, we've never required even
02:09:03 7 the person to be facing the officer for the officer to
02:09:06 8 have -- be able to show that there was an objective
02:09:09 9 reasonable basis for believing the person was a threat.

02:09:11 10 THE COURT: That may be true, but that's from the
02:09:13 11 dissent, is it not?

02:09:14 12 MR. NOGA: No, Your Honor. That's from the
02:09:16 13 majority -- are you talking about Cole v. Carson, Your
02:09:21 14 Honor?

02:09:21 15 THE COURT: Yes.

02:09:21 16 MR. NOGA: No, no, I'm talking about Wilson and
02:09:23 17 I'm talking -- the Fifth Circuit decision in Wilson and the
02:09:26 18 Fifth Circuit decision in Garza. There's actually six or
02:09:28 19 seven dissents, I believe, in Cole v. Carson. Judge Ho and
02:09:33 20 Judge Oldham had a dissent, Judge Smith had a dissent,
02:09:34 21 Judge Jones had a dissent, even Judge Willett had a
02:09:40 22 dissent. And the fact of the matter was that that case had
02:09:43 23 material facts that you don't have a dispute on in this
02:09:46 24 case.

02:09:46 25 THE COURT: I'm not disagreeing with you. I'm

02:09:48 1 asking about the language about we've never required anyone
02:09:51 2 to actually shoot the gun or to be facing the officer.
02:09:55 3 That's referenced in one of the dissents. But it's -- it's
02:09:58 4 a minor point.

02:09:59 5 MR. NOGA: Yes, Your Honor. Thank you.

02:10:00 6 THE COURT: You can move on.

02:10:01 7 MR. NOGA: Yeah.

02:10:02 8 And, again, just to answer Your Honor where I was
02:10:06 9 referencing, in Footnote 3, for instance, on Wilson, it
02:10:09 10 says: For similar reasons, we reject Plaintiff's argument
02:10:13 11 that Johnson posed no threat because he never actually
02:10:16 12 aimed his gun at an officer. Plaintiff's identify no basis
02:10:21 13 for second-guessing an officer's split second judgment that
02:10:23 14 a fleeing armed suspect could turn a gun on him at a
02:10:27 15 moment's notice.

02:10:27 16 It also rejected an argument that the suspect made
02:10:29 17 no threatening gestures, citing the Ramirez v. Knoulton
02:10:34 18 case in the footnote, 542 F.3d 124. And it says -- in the
02:10:38 19 opinion I'm quoting in Wilson, it said: Our precedent
02:10:41 20 rejects that argument. We have never required officers to
02:10:45 21 wait until a Defendant turns toward them with weapon in
02:10:48 22 hand before applying deadly force to ensure their safety.

02:10:51 23 And that's, again, at -- at -- I've got the Lexis
02:10:56 24 cite. It's at 10 on the Lexis cite, and I believe it's at
02:11:00 25 709 and 714 on F.3d, citing the Salazar-Limon versus City

02:11:07 1 of Houston case.

02:11:07 2 And I believe where I was going with this, Judge,
02:11:10 3 is that the Fifth Circuit agreed that there was no
02:11:14 4 constitutional violation in Wilson, and the facts are
02:11:16 5 extremely analogous. And to the extent that it is
02:11:19 6 Plaintiff's burden to put a case that admittedly doesn't
02:11:24 7 have to be identical but has to put the question beyond a
02:11:27 8 doubt shows when we look at the Wilson and the Garza cases
02:11:30 9 that the -- those cases told Officer Bristow that his
02:11:34 10 conduct was lawful.

02:11:36 11 So the precedent clearly established law, if you
02:11:39 12 read those decisions by the Fifth Circuit, which are good
02:11:42 13 law, tell us that the actions were reasonable --
02:11:46 14 objectively reasonable under the circumstances because
02:11:48 15 they're so analogous to the facts we have.

02:11:51 16 Ours are even more direct and dramatic in the
02:11:54 17 facts, Judge, because we, unlike a person walking out of
02:11:59 18 the bushes in Cole v. Carson who may not have known the
02:12:03 19 police were there, we have a confrontation. We have
02:12:06 20 commands to drop the weapon. We have a clear and present
02:12:09 21 danger, as I'm going to quote from the evidence.

02:12:10 22 So I think, again, you know, we're not talking
02:12:15 23 about 20/20 hindsight, but when you're looking at that
02:12:18 24 clearly established law prong, Plaintiff -- this is not a
02:12:20 25 case where -- for instance, Judge, we have cases where

02:12:23 1 after a suspect is secured and in handcuffs, right, he was
02:12:27 2 beaten again. And the Court said we have plenty of
02:12:31 3 authority that says once the suspect is secured and once
02:12:34 4 you're -- you're not allowed to continue to inflict
02:12:37 5 physical force when it's unnecessary. That is what I would
02:12:40 6 call clearly established law.

02:12:42 7 Plaintiff also tries to cite -- and since you
02:12:45 8 brought it up, Judge, he tries to cite the Eighth Amendment
02:12:49 9 cruel and unusual, we'll know it when we see it type of
02:12:52 10 cases like Hope versus Pelzer. Those are totally
02:12:56 11 inapposite. Hope versus Pelzer is a prisoner chained in a
02:13:00 12 yard in the sun, not allowed to go to the bathroom. It's a
02:13:04 13 prison punishment case, and it has no bearing or relevance
02:13:08 14 on this case.

02:13:09 15 The last time -- those are rare cases. And the
02:13:12 16 last Supreme Court case that cited that was one where it
02:13:15 17 involved the conditions in a jail where they left the
02:13:19 18 prisoner without clothes and in the cold and in human
02:13:23 19 waste. And the Supreme Court said, okay, we don't need a
02:13:26 20 case where somebody else has been laying in human waste,
02:13:30 21 and it's -- without clothes to know that this is a
02:13:33 22 violation, right? It's an Eighth Amendment type of cruel
02:13:36 23 and unusual punishment situation like Hope v. Pelzer. It's
02:13:36 24 not at all applicable to this.

02:13:42 25 This is -- we have plenty of cases that deal with

02:13:45 1 use of deadly force and excessive force that outline
02:13:48 2 parameters for when actions are reasonable. And it is the
02:13:52 3 burden of this Court to look, as a matter of law, and say
02:13:56 4 were the actions at issue reasonable?

02:13:58 5 I quoted -- I quoted the language from Wilson, but
02:14:03 6 Garza also said that. The arguments in Garza were
02:14:07 7 rejected, and they're similar to the arguments that were
02:14:08 8 advanced by opposing counsel in this case, said Plaintiff
02:14:12 9 was claiming that the District Court didn't look at the
02:14:15 10 totality of circumstances analysis properly in Garza
02:14:19 11 because it -- he was arguing that it didn't show that Garza
02:14:23 12 threatened anyone, he wasn't running from them, and it was
02:14:26 13 a minor offense he was being investigated for.

02:14:29 14 And the Court rejected all of that. They said
02:14:32 15 these facts don't change the facts that are material to the
02:14:36 16 use of deadly force, namely whether he did not respond to
02:14:40 17 commands to drop his gun. And, again, were the officers
02:14:44 18 confronting -- and I'll quote -- based on those facts which
02:14:48 19 suggest that the officers thought they were confronting an
02:14:51 20 unpredictable man armed with a dangerous weapon, which is
02:14:55 21 what we had here, Defendants had probable cause to conclude
02:14:59 22 that Garza posed him a serious threat of physical injury or
02:15:03 23 death. Police officers may use deadly force in those
02:15:05 24 circumstances without violating the Fourth Amendment.

02:15:07 25 So if you look at that, the key for you, Judge, is

02:15:11 1 did Officer Bristow have probable cause to reasonably
02:15:14 2 believe that Mr. Carico posed a serious threat to his own
02:15:19 3 safety, Officer McCraw's safety, Carico's then girlfriend,
02:15:25 4 Ms. Reger's safety, or to safety of others unknown.

02:15:29 5 THE COURT: So what exactly -- how would you
02:15:31 6 articulate the serious threat at that point -- at the point
02:15:36 7 where the shot was fired? What was the serious threat?

02:15:40 8 MR. NOGA: Fair enough, Judge. And if you will
02:15:42 9 indulge me just briefly because I think it's important, I
02:15:45 10 think that's best responded to by referring to the
02:15:48 11 officer's own sworn statements.

02:15:50 12 Bristow told the Texas Rangers: Plaintiff Carico
02:15:56 13 opened the storm door of the residence, took multiple steps
02:16:00 14 toward Kayla and --

02:16:00 15 THE COURT: Can you cite me for where you are in
02:16:02 16 that statement? That will help me.

02:16:04 17 MR. NOGA: Yes, Judge. That's on Page 12 and Page
02:16:08 18 13 of our motion for summary judgment, ECF Document 20.

02:16:11 19 THE COURT: All right. I'm there. Okay.

02:16:12 20 MR. NOGA: Okay. And he said he presented a brown
02:16:16 21 woodgrain long hunting-style rifle. He held the rifle
02:16:20 22 straight up and stated: I'll blow my -- obscenity --
02:16:24 23 brains out. Officer McCraw and I immediately gave Carico
02:16:27 24 multiple loud commands to drop the gun. Kayla then swung
02:16:31 25 the storm door open further, and Carico abruptly turned and

02:16:34 1 began to walk back in the house with the gun. Carico then
02:16:37 2 turned towards Officer McCraw and turned back to walk into
02:16:42 3 the residence. After he entered the residence, which was a
02:16:45 4 metal construction, I knew the exterior walls could easily
02:16:48 5 be penetrated by a rifle round. I was also unaware of
02:16:51 6 other individuals inside the residence.

02:16:54 7 And later, Judge, I'll interject, he said he heard
02:16:57 8 people talking in the house and thought there may be people
02:16:59 9 in there. And McCraw wasn't sure either.

02:17:03 10 Due to the lighting of the interior of the house
02:17:06 11 and the position of Carico, I lost sight of the firearm. I
02:17:10 12 could not tell which way the firearm was pointed as Carico
02:17:14 13 turned to walk back inside the residence. I also knew
02:17:17 14 Carico was talking to somebody inside of the residence
02:17:18 15 prior to coming outside with the rifle. We had not cleared
02:17:22 16 the interior of the residence, and I did not know if there
02:17:25 17 was another person inside the residence who may be shot by
02:17:28 18 Carico. I knew that due to the style of firearm was a high
02:17:32 19 caliber rifle, I knew that our police vests could not
02:17:35 20 withstand a bullet from a high-powered caliber rifle.
02:17:38 21 Fearing that Carico might turn and fire a shot at Kayla who
02:17:41 22 was very close to him or turn again towards Officer McCraw,
02:17:44 23 I fired my duty weapon to stop Carico from shooting his
02:17:47 24 rifle. I was in fear for the life and safety of Kayla,
02:17:51 25 Officer McCraw, myself, and anyone who might have been

02:17:53 1 inside the residence.

02:17:54 2 Now, McCraw says the same thing. He corroborates
02:17:57 3 that in the paragraph after and says: Upon seeing Carico
02:18:00 4 exit the home with the rifle, Officer Bristow and I both
02:18:03 5 drew our firearms and began yelling at him to drop his
02:18:07 6 weapon. Carico refused to put down his rifle and turned to
02:18:10 7 enter the residence at which time Officer Bristow fired one
02:18:14 8 round striking him in the back just under his right
02:18:17 9 shoulder blade causing him to fall to the ground. Although
02:18:20 10 I feared for the safety and life of someone inside the
02:18:23 11 residence, Officer Bristow's (sic) girlfriend or myself, I
02:18:25 12 did not fire my weapon because I did not have a clear line
02:18:30 13 of fire on Carico.

02:18:31 14 Now, Your Honor, I will also note that in the
02:18:35 15 deposition we attached as an exhibit to our summary
02:18:40 16 judgment motion, Officer Bristow -- and it's also
02:18:44 17 consistent -- he was asked at first by Plaintiff: So you
02:18:47 18 basically, you know, had the only fact that he possessed a
02:18:52 19 gun and that he was holding a gun, was that sufficient to
02:18:56 20 justify your use of lethal force?

02:18:59 21 And that's on Page 64 of the deposition.

02:19:01 22 And Bristow responds: There was more factors that
02:19:05 23 went into, and I've explained those factors to you that
02:19:07 24 it's very easy for him to turn around very quick and point
02:19:11 25 it at myself or Officer McCraw or Kayla or anything like

02:19:14 1 that.

02:19:14 2 And then later, on Pages -- and I'll refer you to
02:19:19 3 87 through 90 -- about 90 -- 98 -- 87 through 98 of the
02:19:26 4 deposition, he specifically goes through all the factors
02:19:30 5 that were in his mind that objectively supported his belief
02:19:35 6 that Carico was a threat to his safety of himself and
02:19:38 7 others.

02:19:39 8 He said: When Carico stepped out, did you give
02:19:42 9 him any instructions?

02:19:44 10 I did.

02:19:45 11 What instructions were those?

02:19:47 12 Myself and Officer McCraw told him to drop the gun
02:19:50 13 multiple times.

02:19:50 14 Did Mr. Carico comply?

02:19:53 15 No.

02:19:54 16 Did Mr. Carico make any indication he was going to
02:19:54 17 comply?

02:19:54 18 No.

02:19:54 19 When he walked outside with the rifle, would you
02:19:54 20 describe where his hands were placed on the rifle?

02:20:00 21 His left hand was up on the barrel, and his right
02:20:06 22 hand was down on the wood by the trigger.

02:20:09 23 Could you tell if his finger was on the trigger?

02:20:11 24 I could not, but --

02:20:13 25 Then McCraw said in his deposition: I saw his

02:20:14 1 thumb on the trigger.

02:20:14 2 Based on your observation, was it possible his
02:20:14 3 finger was on the trigger?

02:20:14 4 Yes.

02:20:19 5 Is there any significance that he walked outside
02:20:21 6 with his rifle with his hand possibly on the trigger?

02:20:23 7 Yes.

02:20:24 8 What's that?

02:20:25 9 It's very easy to turn the gun and shoot it in
02:20:30 10 another direction.

02:20:31 11 How long do you think it would have taken
02:20:33 12 Mr. Carico to point that gun at Officer McCraw?

02:20:35 13 Less than a second.

02:20:37 14 And remember, when he turned to walk back into the
02:20:39 15 house, he was now in line with McCraw.

02:20:41 16 Less than a second.

02:20:44 17 How long do you think it would have taken Carico
02:20:46 18 to point that weapon at Ms. Reger?

02:20:49 19 Less than a second.

02:20:50 20 How long would it have taken Mr. Carico to point
02:20:52 21 that weapon at you?

02:20:53 22 Less than a second.

02:20:54 23 How would you describe his state of agitation?

02:20:57 24 It was very high. He was agitated, very agitated.

02:21:01 25 Did that factor into your fear in the moment?

02:21:03 1 Yes.

02:21:04 2 Why?

02:21:04 3 Because when you -- when generally people get mad,
02:21:07 4 whenever they get agitated, they kind of act out and do
02:21:10 5 things that they probably normally wouldn't.

02:21:12 6 In your conversations with Ms. Reger, did she make
02:21:15 7 any comments that would make you believe Mr. Carico was
02:21:19 8 upset or angry?

02:21:20 9 Yes.

02:21:20 10 Did she make any comments to make you think
02:21:23 11 Mr. Carico was upset or angry with her?

02:21:25 12 Yes.

02:21:26 13 And then he says: How long would it have taken to
02:21:28 14 turn around and open fire if he is going back into the
02:21:32 15 house?

02:21:33 16 A little over a second or two seconds.

02:21:34 17 And would that have been directed at the three
02:21:36 18 standing outside?

02:21:37 19 Yes.

02:21:38 20 Would you explain the difference between a 308 and
02:21:41 21 a 9 millimeter weapon?

02:21:42 22 The 308 rifle was what Mr. Carico had. A 308 is
02:21:46 23 designed to have more punch, go a lot farther, go a lot
02:21:50 24 faster, bring down big game animals and other things. I
02:21:53 25 know people hunt elk and everything else with it.

02:21:53 1 Would it be fair to say it's more powerful than a
02:21:59 2 9 millimeter?

02:22:00 3 Yes.

02:22:01 4 With the body armor that you were wearing, would
02:22:01 5 your body armor have been able to withstand a shot from a
02:22:01 6 308?

02:22:06 7 No, sir.

02:22:07 8 When you went into the house, one of the things
02:22:09 9 you did was move Mr. Carico's firearm, correct?

02:22:12 10 THE COURT: Mr. Noga, I've got to ask you to slow
02:22:12 11 down a little bit.

02:22:13 12 MR. NOGA: I'm sorry again, Judge.

02:22:13 13 When you went into the house, one of the first
02:22:21 14 things you did was move away Mr. Carico's firearm; is that
02:22:24 15 correct?

02:22:24 16 Yes, sir.

02:22:25 17 Would it be fair to say when you walked in the
02:22:28 18 house that firearm was still within the reach of
02:22:30 19 Mr. Carico?

02:22:31 20 Yes.

02:22:32 21 And when you were considering whether or not to
02:22:35 22 open fire, did Mr. -- and there was a round in the chamber,
02:22:38 23 by the way -- did Mr. Carico's state of intoxication play a
02:22:44 24 factor?

02:22:44 25 Yes.

02:22:45 1 How did that play a factor?

02:22:46 2 Because from my dealings with intoxicated
02:22:49 3 subjects, they make kind of quick and bad judgments and
02:22:53 4 don't -- they're not really thinking clearly, so they're
02:22:55 5 very kind of -- you never know what's going to come next
02:22:58 6 with them.

02:22:59 7 And said: Was he acting in an irrational manner?

02:23:04 8 Yes.

02:23:05 9 Did his agitated behavior play a role in your
02:23:07 10 decision to open fire that night?

02:23:08 11 Yes.

02:23:08 12 How did his behavior contribute to that?

02:23:11 13 Due to his agitation and Kayla already saying,
02:23:15 14 well, now he's going to be mad at me, I could only assume
02:23:17 15 that he was mad at the whole situation, mad that officers
02:23:21 16 were at his front door. I was afraid he would turn around
02:23:25 17 and take his anger out on myself, Mr. McCraw, or Kayla.

02:23:30 18 With regard to him bringing a weapon or a
02:23:33 19 high-powered rifle into the interaction, was there any
02:23:35 20 reason for him to do that?

02:23:37 21 None, no.

02:23:38 22 The fact that he was intoxicated and agitated,
02:23:41 23 would it be fair that that heightened the concern about how
02:23:44 24 he might use the firearm?

02:23:46 25 Yes.

02:23:47 1 Did Carico's failure to respond to your commands
02:23:49 2 to drop the weapon, did that play a role in your shot that
02:23:54 3 evening in choosing to shoot?

02:23:57 4 Yes.

02:23:58 5 What role?

02:23:59 6 He did not drop the weapon when me and Officer
02:24:02 7 McCraw told him to. And whenever I lost sight of it, I
02:24:04 8 could not tell where it was pointing, so that's when I
02:24:07 9 decided to fire.

02:24:08 10 And then there was testimony about the possibility
02:24:11 11 of another person being inside the residence.

02:24:14 12 And he said: Why did you think that?

02:24:16 13 Because during one of the times he shut the door,
02:24:18 14 I could hear him. Kayla was outside with us. I could hear
02:24:22 15 him inside talking. I didn't know who he was talking to.
02:24:26 16 I didn't know if he was on the phone. I didn't know if
02:24:30 17 there was anybody else inside.

02:24:31 18 Did the possibility of another person being inside
02:24:33 19 the residence play a role in your decision to open fire
02:24:37 20 that night?

02:24:37 21 Yes.

02:24:38 22 What role did that play?

02:24:40 23 If there's a third party in there, then if he
02:24:43 24 returned inside that house with the firearm, he was already
02:24:46 25 acting irrational, we could have had a possibly barricaded

02:24:51 1 subject with a hostage.

02:24:53 2 And then it said: Did Mr. Carico's decision to
02:24:56 3 turn toward the residence or toward the house play a factor
02:24:59 4 in your decision?

02:25:00 5 Yes.

02:25:01 6 Did it force you to make a split second decision?

02:25:04 7 Yes.

02:25:05 8 If Mr. Carico had just remained standing outside
02:25:07 9 the residence, would that have given you more of an
02:25:10 10 opportunity to assess or deal with the situation?

02:25:13 11 Yes.

02:25:14 12 Did Mr. Carico's decision heighten your fear?

02:25:17 13 Yes.

02:25:18 14 And the reason being later, it's testified in the
02:25:21 15 earlier deposition that he could have sought cover in the
02:25:24 16 house, and whatever the walls of the house were, the
02:25:26 17 officers testified to they were afraid that they would then
02:25:30 18 lose track of him, lose sight of him, and he could fire
02:25:35 19 from within the house, and they wouldn't know where it was
02:25:35 20 coming from.

02:25:37 21 And I believe there was also testimony, Your
02:25:39 22 Honor, that the 308 would be able to fire rounds through
02:25:42 23 the thin metal walls of that residence.

02:25:45 24 So -- and I will refer for a corroborating factor
02:25:49 25 to Officer McCraw's deposition on Page 49 through 52, and

02:25:55 1 Officer McCraw said -- they asked him: Did that contribute
02:25:59 2 to your thought that opening fire would be justified?

02:26:02 3 Yes.

02:26:03 4 Why is that?

02:26:04 5 With him putting his thumb on the trigger, that
02:26:07 6 makes him more of a threat. He's prepared to do whatever
02:26:10 7 the case may be. It's not just standing there holding the
02:26:14 8 firearm. He's not just holding the firearm without his
02:26:17 9 hand on the trigger, he's got his finger on the trigger,
02:26:20 10 and he was ready to act.

02:26:22 11 How much more of a threat was he having that
02:26:24 12 finger down on the trigger?

02:26:26 13 A hundred percent more of a threat with his finger
02:26:28 14 on the trigger.

02:26:30 15 Now, it says: In watching the video, Officer
02:26:34 16 Bristow didn't open fire until Mr. Carico turned to go
02:26:37 17 inside the residence. Do you remember seeing that from the
02:26:40 18 video?

02:26:41 19 Yes, sir.

02:26:42 20 Would that have contributed to you thinking he may
02:26:45 21 or may not pose a threat?

02:26:47 22 No, sir.

02:26:47 23 He said: Would a 308 be able to fire at you -- at
02:26:53 24 y'all through the walls of his residence?

02:26:55 25 Yes, sir.

02:26:56 1 What weapon did you have that night?

02:26:58 2 I had a Springfield XD Mod 2, 9 millimeter.

02:27:03 3 Would you have been able to return fire through
02:27:06 4 the wall of his residence?

02:27:07 5 No, sir.

02:27:08 6 Would being back in the residence have given him
02:27:09 7 additional cover if there was a fire fight between the two
02:27:11 8 of you and Mr. Carico?

02:27:13 9 Yes, sir.

02:27:15 10 With the body armor that you were wearing that
02:27:17 11 day, would the body armor have been able to stand up to a
02:27:19 12 308 round?

02:27:20 13 No, sir.

02:27:23 14 And they talked about him -- Officer Bristow --
02:27:25 15 Officer McCraw describes him as coming out with intent, and
02:27:28 16 the question was: Did that make you fear for your life?

02:27:31 17 Answer: A hundred percent. I feared for
02:27:34 18 everybody's life who was there.

02:27:37 19 And I think that one point I want to also
02:27:43 20 emphasize, Your Honor, is that I don't believe that any of
02:27:45 21 the evidence attached to the response from opposing counsel
02:27:51 22 was anything other than what we attached. So my point of
02:27:55 23 emphasis is that with the video you have and with the
02:27:59 24 corroborating sworn testimony from both officers, both in
02:28:01 25 their statements to the Texas Rangers, which were

02:28:04 1 consistent, and in their deposition testimony, you have a
02:28:08 2 whole host of facts out there that lead support for the
02:28:13 3 fact that they had a reasonable -- objectively reasonable
02:28:16 4 belief that Mr. Carico was a danger and a threat.

02:28:21 5 And I would suggest that those cases that I cited
02:28:24 6 where in one case the man was waving -- Garza -- he was
02:28:29 7 waving around a BB gun. They didn't know that.

02:28:31 8 THE COURT: So can I ask you about something
02:28:33 9 that's in the Plaintiff's response, and I'll obviously give
02:28:36 10 him a chance to address it as well.

02:28:38 11 MR. NOGA: Yes, Your Honor.

02:28:39 12 THE COURT: But at the bottom of Page 7 in the
02:28:41 13 Plaintiff's response, Plaintiff writes that Officer Bristow
02:28:45 14 was unable to identify any specific conduct that justified
02:28:51 15 his decision to shoot Mr. Carico in the back, except for
02:28:55 16 being in possession of a gun.

02:28:59 17 Is that correct?

02:29:00 18 MR. NOGA: No, Judge, it's not. And that's why I
02:29:03 19 went through -- he tried to ask him that question in his
02:29:05 20 deposition, and that's why I read the -- that same question
02:29:08 21 from him first. And Bristow said: No, I gave you a whole
02:29:13 22 host of factors that went into the decision to shoot. And
02:29:16 23 then I read you all of the factors that Bristow went
02:29:19 24 through saying: Here are all the things that went into my
02:29:21 25 decision to shoot.

02:29:23 1 And I'm sorry, but that's just a misstatement.

02:29:25 2 Read the deposition testimony. Everything I just read to
02:29:28 3 you from those pages is Bristow outlining numerous factors
02:29:33 4 as to why he reasonably thought there was a threat to his
02:29:37 5 life and the safety of others.

02:29:38 6 THE COURT: And all that's in the record?

02:29:40 7 MR. NOGA: Yes. Yes, Judge.

02:29:41 8 And -- and just to be real clear, I would like you
02:29:44 9 to take that assertion by Plaintiff and compare it to the
02:29:50 10 deposition testimony of Officer Bristow that I read and the
02:29:56 11 deposition testimony of Officer McCraw.

02:29:59 12 THE COURT: Is there anything that is on the body
02:30:03 13 cam footage of Officer McCraw that's different from what is
02:30:06 14 seen on Officer Bristow's body cam?

02:30:09 15 MR. NOGA: Other than the angle, no. The one
02:30:11 16 thing you can see is that Bristow had a little different
02:30:15 17 perspective because McCraw was stationed aside. And when
02:30:18 18 McCraw was asked why he didn't shoot, he later -- because
02:30:22 19 Kayla, the girlfriend, was in my line of fire, I couldn't.

02:30:25 20 And when Mr. Carico was turning to go back in the
02:30:29 21 house, you can see the different angle. He actually turns
02:30:33 22 toward where Officer McCraw's position is, and that's why
02:30:35 23 the testimony I just read where Officer Bristow said I
02:30:39 24 couldn't tell where the gun was pointed, I lost sight of
02:30:43 25 where the gun was --

02:30:45 1 THE COURT: He turns in a counterclockwise manner?

02:30:48 2 MR. NOGA: I believe so, Judge. Yeah, he turns to
02:30:51 3 go back in, and he still had the rifle in hand. And the --
02:30:55 4 the pages that I was referring to -- again, Judge, if you
02:30:57 5 would take a look at -- the part on Page 64 is where
02:31:04 6 Officer Bristow refutes Plaintiff's attorney's deposition
02:31:07 7 said: I gave you a whole host of factors as to what went
02:31:11 8 into my decision.

02:31:13 9 And then the pages I read to you from Pages 81 on
02:31:18 10 through 90 -- 98, 81 through 98 goes through all the
02:31:22 11 factors that Bristow testified to, and they're consistent
02:31:25 12 with what he told the Rangers.

02:31:28 13 And, Judge, I will tell you that this Court --
02:31:31 14 you're familiar with this situation in a less dramatic way
02:31:37 15 because you upheld qualified immunity in a case -- I
02:31:39 16 believe it was called Grigsby, a few years ago where
02:31:42 17 somebody was brandishing a shiny object in his right hand
02:31:46 18 and the officer shot him because the officer thought it was
02:31:49 19 a knife. It was not. But the facts supported a reasonable
02:31:53 20 belief that the officer was in fear for his safety.

02:31:55 21 Again, in this case, Judge, it's not a stretch.
02:31:59 22 The whole issue is not that this is a tragedy. It is a
02:32:05 23 tragic result. Nobody disputes that. And if you look at
02:32:08 24 the video and run it all the way, you're going to see
02:32:11 25 Officer Bristow in tears, crying after this is all over.

02:32:15 1 But he did -- he made the decision he had to make
02:32:17 2 because of the factors involved. And anyone who is
02:32:19 3 standing in a front yard with somebody with a high-powered
02:32:24 4 rifle and it is inarguable that they can turn and point
02:32:27 5 that any direction in a split second, and unlike the other
02:32:32 6 case that Plaintiff cites, and it certainly doesn't apply
02:32:35 7 to the Cole v. Carson case -- unlike the other case that
02:32:39 8 Plaintiff cites, we have multiple commands, drop the rifle,
02:32:43 9 put the rifle -- both officers pulled their guns when he
02:32:47 10 came out with the rifle. They didn't shoot right away.

02:32:50 11 And I believe in the deposition, Plaintiff was
02:32:52 12 asked -- asking Officer Bristow: Why didn't you shoot him
02:32:55 13 right when he came out the door with the rifle? And
02:32:59 14 Bristow was like: Well, I -- first I drew my gun. I was
02:33:01 15 trying to process the situation, and it was so quick. But
02:33:03 16 he didn't shoot right away.

02:33:05 17 And when he and McCraw both drew their guns
02:33:09 18 roughly at the same time, both of them told him put the
02:33:11 19 rifle down. Nothing would have happened if he would have
02:33:15 20 done that. Or even if he would have taken the rifle and
02:33:21 21 held it out here one hand by the barrel, okay? But when
02:33:23 22 you've got it in your hand, it takes a split second to use
02:33:25 23 it when you've got an agitated, angry drunk person.
02:33:30 24 There's no rebuttable testimony there. Everybody said he
02:33:33 25 appeared drunk. He certainly was angry. He's intoxicated.

02:33:37 1 He was erratic, and he was threatening. And he had a
02:33:43 2 high-powered rifle in his hand.

02:33:45 3 Now, if he goes in that house, this is not a case
02:33:48 4 where we're playing 20/20 hindsight. This is not a case --
02:33:48 5 Plaintiff basically wants you to say, let this go to the
02:33:51 6 jury. Let me try to convince the jury he wasn't really a
02:33:54 7 risk. Those cases I read you and the related Fifth Circuit
02:33:57 8 cases that are cited in Garza and in Bastrop, all those
02:34:03 9 cases say that's not relevant. That's not for a jury to
02:34:10 10 decide.

02:34:11 11 The case is, as a matter of law, was there facts
02:34:14 12 known to the officer, the totality of facts that led him to
02:34:18 13 have probable cause to reasonably believe Carico was a
02:34:22 14 threat, an immediate danger?

02:34:24 15 And he could have done any number of things.
02:34:26 16 Plaintiff says: Well, he was heading back to the house.
02:34:29 17 Plaintiff says: He didn't really point the gun at you.
02:34:31 18 That's not required. It can be pointed at you in a split
02:34:35 19 second, and all the cases at the Fifth Circuit say he
02:34:38 20 doesn't have to point the gun at you.

02:34:40 21 Plaintiff also makes an argument, well, they
02:34:42 22 didn't tell him they were going to use deadly force. First
02:34:45 23 of all, when officers have their guns drawn, I think that's
02:34:48 24 a pretty clear signal. But more than that, the case law
02:34:51 25 doesn't require them to. There is no case that says you

02:34:54 1 first -- while somebody has a gun or is pointing a gun at
02:34:58 2 you, you first have to say: I'm going to shoot you if you
02:35:01 3 don't stop pointing that gun at me. No such case. And the
02:35:01 4 practicalities are obvious, and the Fifth Circuit's upheld
02:35:07 5 those practicalities.

02:35:07 6 So now you have a situation where he said, oh,
02:35:10 7 well, he wasn't going to do anything. His subjective
02:35:12 8 intent is also irrelevant. It's the facts at the scene,
02:35:18 9 intense and evolving circumstances. And if he goes in that
02:35:21 10 house, he could have done a lot of things. As he's heading
02:35:24 11 in the door, he could have turned around and fired. If he
02:35:27 12 had got in the house, they wouldn't know where he's at. He
02:35:31 13 could have taken potshots at them from inside the house.
02:35:31 14 You knew he had a rifle. There's no doubt he has access to
02:35:34 15 it. When they went and got the rifle from him after the
02:35:37 16 one shot that incapacitated him, it was loaded. It had
02:35:41 17 bullets in it.

02:35:42 18 So -- you know -- and, again, to a certain extent,
02:35:45 19 it's immaterial in the fact that we've got cases where a BB
02:35:50 20 gun was deemed to be an appropriate threat if the officers
02:35:53 21 had a reasonable belief it looked like a weapon, your case
02:35:56 22 where the shiny object in the hand was deemed a reasonable
02:35:59 23 threat to uphold qualified immunity in Grigsby, and then
02:36:05 24 you've got the Garza case. And then you've got Wilson
02:36:08 25 where he's running away from the officers with a gun in his

02:36:10 1 hand disobeying commands, and they shot him. And the Fifth
02:36:14 2 Circuit said that is fine. Qualified immunity applies.

02:36:17 3 And, again, I think the video evidence --
02:36:22 4 Plaintiff didn't introduce any evidence, Judge. You don't
02:36:25 5 have any evidence from him. You don't have affidavits.
02:36:27 6 You don't have different videos. You don't have anything.
02:36:29 7 You have our videos, you have the statements, and you have
02:36:36 8 deposition testimony and all are consistent.

02:36:39 9 And the relevant inquiry, again, it's not as to
02:36:41 10 subjective intent, right? It's whether -- and the Garza
02:36:47 11 Court put it well. The Fifth Circuit said in a similar
02:36:49 12 case in Garza, the question is whether Defendant's view
02:36:52 13 that Garza posed a threat of serious physical harm was
02:36:56 14 objectively reasonable.

02:36:57 15 And based on all those facts I read you, the
02:36:59 16 deposition testimony, the video, I would say it would be
02:37:05 17 hard-pressed to say it's not reasonable for somebody to be
02:37:08 18 afraid of somebody with a high-powered rifle in close
02:37:12 19 proximity to them when that person is angry, drunk,
02:37:16 20 intoxicated, uncooperative, and won't follow commands to
02:37:20 21 put the gun down. They didn't just start firing. And they
02:37:20 22 only fired one shot, and then they rendered medical aid.

02:37:25 23 And as I said, tragic, yes. You had an officer
02:37:29 24 crying after the fact. Nobody wanted this to happen.
02:37:35 25 Tragic, yes, but also lawful.

02:37:37 1 And I believe that the Cole v. Carson case is
02:37:41 2 totally inapposite. You've got questions of fact --
02:37:45 3 material fact that you don't have. All you have here is
02:37:47 4 conjecture, conclusory statements, speculation as to what
02:37:52 5 Plaintiff could or could not have done, and all of that is
02:37:53 6 irrelevant.

02:37:54 7 The only thing the Supreme Court has said is
02:37:57 8 irrelevant is the facts and the totality of the
02:38:00 9 circumstances at the time that went into the officer's
02:38:04 10 belief that they had a reasonable probable cause to deem
02:38:07 11 this person a serious threat.

02:38:10 12 And I think in Garza, and I keep citing that case
02:38:15 13 because those two are directly on point. The Fifth Circuit
02:38:18 14 wrote that Plaintiff's theories failed to provide adequate
02:38:22 15 deference to Defendant's snap judgment in the heat of a
02:38:28 16 perilous and rapidly evolving situation about the danger
02:38:32 17 Garza posed. You could substitute Mr. Carico's name for
02:38:37 18 Garza, and it applies here. Okay? Plaintiff failed to
02:38:40 19 provide adequate deference to Defendant's snap judgment in
02:38:41 20 the heat of a perilous and rapidly evolving situation.

02:38:45 21 You know, Judge, I think in the case at hand,
02:38:49 22 again, there's no dispute of the relevant facts. We went
02:38:53 23 through them in detail in the deposition. Both officers
02:38:56 24 had cogent rationale for what they did and how they acted.
02:39:02 25 And I think all of these facts -- all of these support the

02:39:05 1 objectively reasonable belief that Mr. Carico posed a
02:39:09 2 danger.

02:39:09 3 You know, the Texas Rangers validated Officer
02:39:12 4 Bristow's action. A Lamar County grand jury validated and
02:39:18 5 examined Officer Bristow's action. And here we are yet
02:39:23 6 again, subject to the further review of this court. So
02:39:27 7 tragic, absolutely. But lawful, I would say absolutely.

02:39:30 8 And I think that this Court can rule on one or
02:39:34 9 both. As the District Court did in Wilson with the man
02:39:37 10 running away with the gun who was shot and qualified
02:39:40 11 immunity was upheld, the District Court said both counts,
02:39:45 12 qualified immunity prevails.

02:39:47 13 First count, no constitutional violation.

02:39:50 14 Number two, there is no clearly established law
02:39:52 15 that would show he acted unreasonably in defiance of.

02:39:56 16 I would suggest that the same holds true in this
02:39:59 17 case, although, obviously, the Court need only go to one
02:40:02 18 prong if it desires.

02:40:04 19 But with that, Your Honor, I don't want to belabor
02:40:07 20 my time. You've been very patient with me, and thank you
02:40:10 21 for putting up with my occasional rapid speech pattern.
02:40:14 22 That comes from having too many time limits usually set on
02:40:19 23 me in federal court, Judge.

02:40:21 24 THE COURT: Thank you.

02:40:21 25 MR. NOGA: And I'll answer any questions you may

02:40:23 1 have.

02:40:24 2 THE COURT: No, that's all I have. Thank you,
02:40:25 3 Mr. Noga.

02:40:26 4 MR. NOGA: Thank you.

02:40:26 5 MR. MAGUIRE: May I, Your Honor?

02:40:33 6 THE COURT: Oh, yes.

02:40:34 7 MR. MAGUIRE: I want to start by getting to the
02:40:36 8 point, and I think it's an issue that you started to
02:40:39 9 address in the beginning of Mr. Noga's address to the
02:40:43 10 Court.

02:40:44 11 The question is what case law clearly establishes
02:40:50 12 that the conduct of Officer Bristow was impermissible under
02:40:54 13 these circumstances? That case has been identified. It's
02:40:57 14 in the briefing. And the proposition that Cole stands for
02:41:01 15 is that an officer is not entitled to qualified immunity
02:41:03 16 where an armed individual who has only threatened himself
02:41:10 17 and who has his back to an officer and is not given a
02:41:14 18 meaningful opportunity to respond to directions to drop the
02:41:18 19 weapon occurs.

02:41:20 20 Those are the factors that we have here.

02:41:24 21 THE COURT: There was a bystander, though, in this
02:41:27 22 case where there was not in Cole; is that right?

02:41:30 23 MR. MAGUIRE: Well, there were many officers in
02:41:34 24 the area in -- in the Cole case.

02:41:36 25 THE COURT: Was there -- was there an officer or

02:41:38 1 any other person adjacent to the Plaintiff in that case as
02:41:46 2 there was in this case?

02:41:47 3 MR. MAGUIRE: Adjacent to? I don't think that the
02:41:53 4 facts described by the Court in Cole v. Carson, you know,
02:41:56 5 provide a diagram or a specific layout. In that case, the
02:42:00 6 discharging -- there were officers following the young man.
02:42:04 7 It was a 17-year-old walking around the neighborhood with a
02:42:06 8 pistol at some points pointing it to his own head and --

02:42:11 9 THE COURT: But do you know -- I mean, I'm just
02:42:14 10 looking for an answer.

02:42:15 11 Do you know, was there anyone near him when the
02:42:18 12 shooting occurred in the Cole case?

02:42:20 13 MR. MAGUIRE: I would -- I would say from my
02:42:23 14 reading of the facts, there was no one in a similar
02:42:26 15 proximity as Ms. Reger was to Mr. Carico at the time.
02:42:31 16 Though, the facts don't go into depth about the specific
02:42:36 17 location of the officers that did not go with the
02:42:38 18 discharging officer and his partner.

02:42:43 19 Specific -- so the Court -- and I want to talk a
02:42:49 20 little bit about the facts in Cole v. Carson. Again, this
02:42:55 21 was a 17-year-old young man. The police were made aware he
02:42:59 22 was carrying a pistol around the neighborhood interacting
02:43:02 23 with many people. In that case, the mere fact that he was
02:43:05 24 17 and carrying a pistol made him acting in the commission
02:43:09 25 of a crime.

02:43:11 1 There was no crime that these officers could have
02:43:14 2 arrested Mr. Carico for at the time that he had discharged,
02:43:18 3 unlike the young man who was carrying a pistol.

02:43:21 4 He went into the woods and was followed from some
02:43:26 5 distance from officers from one department, and there were
02:43:30 6 two officers from another department who, without being
02:43:32 7 directed to by the officers in charge, sort of covertly
02:43:37 8 went into the woods to take a different vantage point. And
02:43:41 9 from there, they saw the young man step out of the woods
02:43:44 10 with the gun only to his head and him -- and them not
02:43:48 11 pointing towards the police officers.

02:43:51 12 There were various versions of what happened that
02:44:02 13 the Court had to contend with, but ultimately, what they
02:44:05 14 found was that the officers provided no warning that
02:44:08 15 granted Ryan sufficient time to respond and that Ryan was
02:44:12 16 not given an opportunity to disarm himself before he was
02:44:15 17 shot.

02:44:16 18 So I wanted -- we can see the video makes clear --
02:44:23 19 it is undisputed in this case that Officer Bristow said,
02:44:28 20 drop your gun -- drop the gun before he discharged his
02:44:32 21 weapon.

02:44:32 22 The question and the video -- and the amount of
02:44:35 23 time between him saying that and the time that he fired, I
02:44:38 24 will defer to the portions of the second -- to the video,
02:44:44 25 but it's less than two seconds.

02:44:47 1 More importantly, Officer Bristow, before
02:44:49 2 discharging his firearm, concedes that he was not aware if
02:44:53 3 that order had been complied with. He was not aware if
02:44:56 4 Mr. Carico had dropped the gun. He simply -- he did not
02:45:02 5 see where the hand was, and he said it was entirely
02:45:05 6 possible that his -- that his order had been complied with.

02:45:09 7 So as Cole v. Carson tells us -- the Court in Cole
02:45:15 8 v. Carson tells us, there has to be a meaningful
02:45:17 9 opportunity, a meaningful warning. It's not sufficient to
02:45:22 10 just utter the word "drop the weapon," and then the officer
02:45:25 11 be entitled to shoot.

02:45:27 12 In this case, that's precisely what may have
02:45:30 13 happened, and a jury should be given the opportunity to
02:45:31 14 determine if that is what happened.

02:45:33 15 Certainly, when he was told to drop the gun,
02:45:36 16 Mr. Carico took steps to be in a less threatening position.
02:45:40 17 He turned his back to the officer. So from the time he
02:45:43 18 said drop the gun, he's not sure if Carico drops the gun,
02:45:47 19 and Carico is now facing his back.

02:45:49 20 That puts us in a very similar situation to what
02:45:53 21 we had in Cole where the Court said in a situation where an
02:45:56 22 individual has only threatened harm to himself, he has not
02:46:00 23 threatened harm to anyone else, and that individual is not
02:46:05 24 facing you and is, therefore, not an immediate threat with
02:46:09 25 the weapon at the time he's shot and is not given a

02:46:13 1 meaningful opportunity to drop the weapon, you are not
02:46:17 2 entitled to qualified immunity.

02:46:18 3 That's precisely where we find ourselves in this
02:46:21 4 case. And, you know, it is --

02:46:23 5 THE COURT: Can you cite me to the -- to the page
02:46:27 6 in Cole where the Court articulates --

02:46:27 7 MR. MAGUIRE: Sure.

02:46:32 8 THE COURT: -- the test as you're describing it?

02:46:33 9 I mean, I know that in the majority opinion in
02:46:37 10 Cole, they make several references to it being an obvious
02:46:40 11 case.

02:46:42 12 MR. MAGUIRE: Sure. This is on Page 4 -- 449,
02:47:06 13 Your Honor, and the paragraph actually begins on 448. The
02:47:10 14 specific language I was discussing arrives in 449.

02:47:16 15 THE COURT: Okay. And where -- where
02:47:19 16 specifically -- I mean, I see the reference to not being
02:47:22 17 given an opportunity to disarm himself.

02:47:25 18 MR. MAGUIRE: Sure. So what a Court -- what
02:47:27 19 occurred next is disputed, given the summary judgment
02:47:30 20 evidence and drawing reasonable inferences and favorable --
02:47:35 21 in favor of the non-movant, the District Court determined
02:47:38 22 that a reasonable jury could find the following. And one
02:47:42 23 of those -- it's No. 12 -- is that officers provided no
02:47:47 24 warning that granted Ryan a sufficient time to respond such
02:47:50 25 that Ryan was not given an opportunity to disarm himself

02:47:53 1 before he was shot.

02:47:54 2 THE COURT: And so -- and so as you frame the
02:47:58 3 question here, it's whether or not the Defendants are
02:48:03 4 entitled to qualified immunity because they did not give
02:48:10 5 the Plaintiff an opportunity to disarm himself before he
02:48:14 6 was shot?

02:48:14 7 MR. MAGUIRE: So in the peculiar structure of
02:48:20 8 qualified immunity where it is the obligation of the
02:48:24 9 responding party to direct the Court to the specific
02:48:28 10 authority that clearly establishes that a certain
02:48:33 11 circumstance does not permit the use of lethal force, we
02:48:37 12 find ourselves here in this very specific framework.

02:48:39 13 And I -- again, it's clear that under this
02:48:43 14 framework, as articulated by Cole, all of those things are
02:48:47 15 required or all of those things are a question for the jury
02:48:49 16 as to whether or not they were required.

02:48:51 17 Here --

02:48:53 18 THE COURT: What do you mean as to whether or not
02:48:56 19 they were required? What do you mean --

02:48:58 20 MR. MAGUIRE: Oh, excuse me, as to whether or not
02:49:01 21 they were -- as to whether or not these factors were met by
02:49:05 22 the -- if these factors are met, it's a question that goes
02:49:10 23 to the jury.

02:49:10 24 THE COURT: So the only factor that you've given
02:49:12 25 me, though, is that he wasn't giving -- given a meaningful

02:49:16 1 opportunity to disarm himself?

02:49:19 2 MR. MAGUIRE: Well, also similar to the decedent
02:49:23 3 or to the injured party in Cole, he had never threatened
02:49:27 4 anyone but himself with violence. He pointed the -- from
02:49:31 5 the moment the gun is introduced, he holds the gun to
02:49:37 6 himself, just as the young man in Cole v. Carson only held
02:49:40 7 the gun, that was clearly a factor that was taken into
02:49:42 8 consideration by the Court. So, again, Mr. Carico never
02:49:49 9 threatened anyone but himself, just as the individual in
02:49:54 10 Cole v. Carson.

02:49:55 11 The other factor is that just as in -- the
02:50:03 12 individual in Cole, he was not facing the officer at the
02:50:06 13 time that he was shot. The ballistics revealed that he was
02:50:12 14 only at a bladed angle, like 90 degrees, from the officer.

02:50:17 15 So, again, the young man at the time that he was
02:50:20 16 shot in Cole v. Carson was in an almost identical situation
02:50:25 17 as Mr. Carico. He had only threatened himself. He was not
02:50:29 18 facing the officer or pointing a gun at the officer at the
02:50:32 19 time he was shot, and he was not given a meaningful
02:50:37 20 opportunity to disarm himself prior to being shot.

02:50:40 21 And as qualified immunity cites go, this is on all
02:50:50 22 fours. It's not exactly the same, but every single
02:50:52 23 relevant factor identified by the en banc court of the
02:50:57 24 Fifth Circuit is satisfied in this case.

02:50:58 25 THE COURT: So would you describe the ways that

02:51:00 1 you think the cases are different?

02:51:02 2 MR. MAGUIRE: Well, there are -- there are ways
02:51:06 3 that the case is different that benefit Mr. Carico. One,
02:51:09 4 he's in his own home. He's not a threat to the public.
02:51:12 5 He's not a threat to wander off.

02:51:17 6 Two, he was removing himself from the presence of
02:51:24 7 the officers into -- back into his own home at the time
02:51:29 8 that he was shot.

02:51:30 9 And, you know, Your Honor, you asked Defense
02:51:36 10 counsel about a representation that I made in my briefing,
02:51:42 11 and I want to quote it precisely, that Officer Bristow was
02:51:45 12 unable to identify any specific conduct that justified
02:51:50 13 to -- his decision to shoot Mr. Carico in the back, except
02:51:54 14 for that he was in possession of a gun.

02:51:56 15 Now, they gave a lot of speculation in response to
02:52:00 16 that, but I still didn't hear them talk about any specific
02:52:05 17 conduct, anything that Mr. Carico did. Certainly, anything
02:52:09 18 could happen -- he could have gone inside and started doing
02:52:15 19 science experiments. Anything could have happened. But
02:52:18 20 that --

02:52:19 21 THE COURT: But there -- but there -- but to be
02:52:21 22 fair, there were a number of things that were discussed
02:52:26 23 in -- in Officer Bristow's deposition about, you know,
02:52:33 24 concerns that he had possible risks, things that could have
02:52:37 25 happened. Those -- those were things by his own testimony

02:52:40 1 that he considered in making this decision.

02:52:44 2 So help me understand why that doesn't matter in
02:52:49 3 your view. And -- because I understand you've made that --

02:52:53 4 MR. MAGUIRE: Understood. And just to be clear,
02:52:55 5 the extensive recitation of Mr. -- or of Officer Bristow's
02:53:03 6 deposition was the rehabilitation portion of the
02:53:05 7 deposition. Those questions were being asked --

02:53:07 8 THE COURT: I understand.

02:53:08 9 MR. MAGUIRE: -- and led by his own counsel.

02:53:11 10 The reason is -- an officer can arrive -- with all
02:53:14 11 due respect to police officers and occasional self-serving
02:53:19 12 statements that they make after they engage in conduct that
02:53:22 13 either doesn't comply with directives or the law, they can
02:53:23 14 say anything about what could happen.

02:53:25 15 Yes, you can speculate. You could speculate that
02:53:29 16 if he had gone inside, he would have done any number of
02:53:32 17 things, but there was no conduct on the part of Mr. Carico
02:53:35 18 that would -- that would reasonably make you believe that
02:53:38 19 those things would happen. He didn't -- he said what his
02:53:41 20 intent was, which was to harm himself. He -- his conduct
02:53:47 21 and the manner that he handled the weapon was only
02:53:50 22 projected toward self-harm. He never pointed it at anyone
02:53:53 23 else. He never said, I'm going to kill you. I'm going to
02:53:56 24 kill my girlfriend. I'm going to go in and set the place
02:53:59 25 on fire. You guys better watch your back, I'm going to

02:54:03 1 shoot through the walls of the house, or anything like
02:54:07 2 that.

02:54:07 3 So after the fact, they can come up with all of
02:54:08 4 these things that potentially could have happened. It is
02:54:14 5 clear, naked speculation. And, you know, the idea that if
02:54:19 6 he had run into the house, that he had weapons -- I mean,
02:54:23 7 almost -- I don't know the percentage of homes in -- in
02:54:26 8 this district that have guns inside of them, rifles in
02:54:33 9 particular, that, you know, could be used to shoot through
02:54:35 10 walls. That doesn't make it reasonable speculation. He
02:54:39 11 never indicated any desire to harm these officers.

02:54:43 12 So for them to just say, well, if he had gone back
02:54:46 13 into his home, where he was entitled to stay by their own
02:54:49 14 testimony -- they said if he didn't come out, we had to
02:54:53 15 just leave, and maybe we'd get a warrant, maybe we
02:54:56 16 wouldn't, but we had no legal authority to drag him out of
02:54:59 17 the house. We had no legal authority to arrest him.

02:55:02 18 So if he comes out and then he's walking back in,
02:55:05 19 he's entitled to be there, and he's entitled to be in
02:55:07 20 possession of a rifle in his own home. And for them to say
02:55:12 21 any number of things could have happened, it simply doesn't
02:55:15 22 justify the most powerful use that the Government grants
02:55:21 23 individuals to use against their fellow citizens, the use
02:55:25 24 of lethal force. It has to be more than mere speculation
02:55:27 25 that something could have happened. There's no fact --

02:55:28 1 there's no conduct, as I -- as I asked the officer, there
02:55:32 2 is no conduct that justified the decision to shoot.

02:55:35 3 THE COURT: No. And you used the words "specific
02:55:39 4 conduct." Do you mean affirmative conduct, positive
02:55:43 5 conduct?

02:55:44 6 MR. MAGUIRE: I mean conduct that was concrete
02:55:47 7 enough to justify on the balance of all things, all the
02:55:51 8 Graham factors, the fact that this was a low-level motor
02:55:57 9 vehicle accident investigation, the fact that they had no
02:56:01 10 knowledge of any criminal history, the fact that they had
02:56:04 11 no knowledge of any violence being involved in any of this,
02:56:07 12 the fact that they had no knowledge of him ever expressing
02:56:11 13 in his life any intent to harm his -- his significant
02:56:18 14 other.

02:56:18 15 All of those factors, when you look at them,
02:56:23 16 indicate that on balance, the decision to use lethal
02:56:28 17 force -- well, it's not justified, and it doesn't make a
02:56:34 18 reasonable, concrete, valid basis to use, again, the most
02:56:38 19 powerful use of governmental authority that we have.

02:56:41 20 So, again, Your Honor, all of these factors, all
02:56:55 21 of the Graham factors weigh in favor of Mr. Carico. There
02:57:00 22 is authority that is clearly on point that an individual
02:57:05 23 who never threatens harm to anyone but themselves and has
02:57:09 24 their back to a police officer and is not been given a
02:57:14 25 meaningful opportunity to disarm themselves is not entitled

02:57:17 1 to qualified immunity. That is the circumstance of this
02:57:21 2 case.

02:57:21 3 This is a -- I agree with counsel, this is an
02:57:25 4 extremely tragic circumstance. My client is injured to the
02:57:30 5 extent that he will require aid for the rest of his life.
02:57:35 6 And a jury -- eight members of the Eastern District of
02:57:43 7 Texas should be given the opportunity to review that
02:57:46 8 videotape, to look at everything that happened, to be given
02:57:50 9 the law, and to -- and to make a decision as to whether or
02:57:56 10 not this was reasonable.

02:57:57 11 Clearly, they're not entitled to qualified
02:57:59 12 immunity. And if the starting point of your inquiry on the
02:58:02 13 issue of reasonableness is an individual who was shot in
02:58:06 14 the back when the officer didn't even know if he was
02:58:08 15 holding a gun, that by -- is absolutely a question for a
02:58:11 16 jury to decide whether or not that officer was reasonable
02:58:15 17 to be in fear of imminent danger.

02:58:21 18 THE COURT: And Cole is the best case you've got
02:58:23 19 for that proposition?

02:58:23 20 MR. MAGUIRE: Cole is an en banc Fifth Circuit
02:58:26 21 case that is on point with all of the issues. The only
02:58:28 22 distinction was in the -- well, short answer, yes, Your
02:58:32 23 Honor, that's the case we're relying on to establish that
02:58:35 24 they're not entitled to qualified immunity.

02:58:36 25 THE COURT: The only distinction is what?

02:58:38 1 MR. MAGUIRE: Well, the only distinction was there
02:58:41 2 were various questions about what was said and when it was
02:58:44 3 said. The officers changed their story multiple times in
02:58:48 4 Cole. The Court was -- was sorting out --

02:58:52 5 THE COURT: That actually was a big issue in Cole,
02:58:55 6 was it not?

02:58:55 7 MR. MAGUIRE: It was an issue, and in that -- in
02:58:59 8 that case, there was a question as to whether or not
02:59:03 9 either -- they found that a reasonable jury could find that
02:59:06 10 no warnings were given or that insufficient warnings,
02:59:10 11 meaning non-meaningful warnings were given.

02:59:15 12 THE COURT: But the issue about the changing
02:59:17 13 stories, didn't the District Judge in that case make a
02:59:20 14 specific finding that the officers had changed their
02:59:23 15 stories multiple times?

02:59:25 16 MR. MAGUIRE: Yes. And that was -- you know, that
02:59:27 17 allowed them, in the Court's mind, to peer into the
02:59:30 18 credibility and give the jury an opportunity to --

02:59:33 19 THE COURT: Right. And I'm not saying it matters
02:59:35 20 here, but there's no evidence that occurred here, is there?

02:59:39 21 MR. MAGUIRE: No, not -- nothing -- nothing like
02:59:42 22 what went on in Cole. I mean, I think we could find
02:59:46 23 distinctions between the testimony and the
02:59:48 24 cross-examination of deposition versus the rehabilitation,
02:59:51 25 but certainly no accusation of the impropriety that went on

02:59:56 1 in Cole.

02:59:57 2 THE COURT: Okay. Couple of questions for you,
03:00:01 3 Mr. Maguire.

03:00:01 4 Is Cole -- is there anything other than Cole that
03:00:05 5 you think supports this idea about not -- you know, the
03:00:13 6 idea that the controlling law is one where you have to give
03:00:21 7 someone a meaningful opportunity to respond to directions
03:00:25 8 to drop the weapon? Is there anything other than Cole from
03:00:29 9 the Fifth Circuit or elsewhere that you think support --

03:00:32 10 MR. MAGUIRE: Well, I think the Supreme Court
03:00:33 11 identified the importance of notice prior to the use of
03:00:39 12 lethal force going back to Graham v. Connor.

03:00:42 13 THE COURT: Back to what?

03:00:43 14 MR. MAGUIRE: Graham v. Connor. I mean, that's --
03:00:47 15 that's where the principle comes from, and every time that
03:00:49 16 issue is analyzed it's because it's been, you know,
03:00:52 17 clear -- Graham is still clear precedent.

03:00:54 18 THE COURT: You made -- make a reference to
03:00:56 19 Graham -- I think you referred to the Graham factors in
03:01:00 20 your argument. Graham is not in your brief.

03:01:02 21 Can you summarize what the Graham factors are?

03:01:06 22 MR. MAGUIRE: I believe -- so the -- it is in my
03:01:47 23 brief, Your Honor.

03:01:47 24 THE COURT: Oh, I'm sorry.

03:01:48 25 MR. MAGUIRE: That's okay, respectfully.

03:01:50 1 And it's on Page 6 of 10. That's with the -- I
03:01:54 2 apologize for not having bottom numbers.

03:01:56 3 THE COURT: Oh, that's all right.

03:01:57 4 MR. MAGUIRE: But it's Page 6 of 10.

03:02:03 5 THE COURT: All right. Okay. I see. My
03:02:05 6 apologies. I see what you're talking about.

03:02:08 7 MR. MAGUIRE: Okay.

03:02:16 8 THE COURT: I do want to ask you another couple of
03:02:18 9 questions.

03:02:19 10 MR. MAGUIRE: Yes, sir. Yes, Your Honor. Sorry.

03:02:21 11 THE COURT: There's a cite at the end of your
03:02:33 12 brief, the last page -- Page 9 of 10, there's a reference
03:02:44 13 to a Tennessee versus Garner case. And that, too, is a
03:02:55 14 Supreme Court case. And you say Tennessee versus Garner
03:03:01 15 announced the principle that where the suspect poses no
03:03:04 16 immediate threat to the officer and no threat to others,
03:03:08 17 the harm resulting from failing to apprehend him does not
03:03:13 18 justify the use of deadly force to do so.

03:03:18 19 What were the circumstances in that case, do you
03:03:20 20 know?

03:03:21 21 MR. MAGUIRE: That was the --

03:03:22 22 THE COURT: Was it a --

03:03:24 23 MR. MAGUIRE: It was a fleeing from a -- it was an
03:03:27 24 individual fleeing, I think, initially by vehicle.

03:03:32 25 THE COURT: Different facts altogether.

03:03:33 1 MR. MAGUIRE: Yes, altogether.

03:03:35 2 THE COURT: Okay. Okay. What -- there's no
03:03:44 3 dispute here, is there, that the Plaintiff was intoxicated?

03:03:54 4 MR. MAGUIRE: I don't know if that has been -- I
03:04:00 5 don't -- that is not a matter of record, Your Honor. I
03:04:02 6 would -- I would defer Your Honor to --

03:04:05 7 THE COURT: Well, let me ask it this way. Do you
03:04:07 8 dispute the allegation that he was intoxicated?

03:04:12 9 MR. MAGUIRE: Candidly, Your Honor, I don't -- I
03:04:17 10 don't feel comfortable answering that question without -- I
03:04:19 11 mean, that is a question, if we get past this stage, if he
03:04:23 12 is deposed, that he can certainly be -- that he could
03:04:27 13 certainly respond to, but at this time, I would -- I would
03:04:29 14 respectfully request that the Court rely upon the record
03:04:33 15 before him.

03:04:37 16 THE COURT: Okay. Tell me what the factual
03:04:38 17 dispute is here. So this is a summary judgment issue.
03:04:45 18 The affidavits of the two officers, as well as excerpts of
03:04:53 19 the deposition of Officer Bristow, as well as the two body
03:05:00 20 cam footage sections are all attached to the motion. You
03:05:06 21 responded to that motion, and I don't know that there's
03:05:11 22 anything --

03:05:12 23 MR. MAGUIRE: There's not, Your Honor. The
03:05:14 24 entirety of --

03:05:15 25 THE COURT: Is there a factual dispute here?

03:05:17 1 MR. MAGUIRE: No. It's on video, Your Honor.

03:05:20 2 THE COURT: Yeah.

03:05:20 3 MR. MAGUIRE: I mean, it -- you know, there's --
03:05:21 4 there's -- it's one of the great things for -- for both
03:05:26 5 citizens and police. We're all held accountable and held
03:05:31 6 under the light of truth to what's on video. What happened
03:05:35 7 on that video is what happened.

03:05:36 8 Officer Bristow responds to that video and says:
03:05:38 9 Yes, I shot him in the back, but I'm entitled to qualified
03:05:45 10 immunity.

03:05:45 11 Our response is: No, you're not. See Cole v.
03:05:48 12 Carson.

03:05:48 13 THE COURT: Yeah, so I guess what I'm struggling
03:05:50 14 with is you say in your brief that there's a factual
03:05:52 15 dispute here, and so I'm trying to understand --

03:05:53 16 MR. MAGUIRE: If there's a -- there's a dispute
03:05:54 17 under the law whether or not they're entitled to
03:05:56 18 qualified --

03:05:56 19 THE COURT: So there's not a factual dispute?

03:05:59 20 MR. MAGUIRE: I don't -- again, there are -- the
03:06:04 21 statements of the officers that can -- that they would
03:06:08 22 characterize as truthful and I would characterize as
03:06:11 23 self-serving require a jury to make credibility
03:06:16 24 determinations. That doesn't -- those aren't -- that --
03:06:23 25 those aren't the facts in the sense of what occurred. They

03:06:26 1 are facts meaning they are statements within the record of
03:06:29 2 the case that may be put before a jury.

03:06:32 3 THE COURT: Okay. Give me one second.

03:06:39 4 MR. MAGUIRE: Yes, sir. Yes, Your Honor.

03:06:40 5 THE COURT: You mentioned the fact that no warning
03:06:53 6 was given here. There was a -- there were instructions,
03:06:56 7 according to the Defendant, to drop the weapon but -- but
03:07:01 8 no warning.

03:07:01 9 What's the difference between what was said and
03:07:06 10 your view of what a warning would have been required?

03:07:09 11 MR. MAGUIRE: Well, a warning would be: You're
03:07:12 12 going to get shot. Drop the gun. You're --

03:07:14 13 THE COURT: If you don't drop the gun, I will
03:07:16 14 shoot you?

03:07:17 15 MR. MAGUIRE: Stop or I'll -- stop or I'll shoot.
03:07:20 16 Drop it or I'll shoot. You're going to get shot.

03:07:23 17 I mean, these are things we hear --

03:07:24 18 THE COURT: To be distinguished from the mere
03:07:27 19 statement: Drop the weapon?

03:07:28 20 MR. MAGUIRE: Drop the weapon. Certainly the
03:07:30 21 officers would testify that the implication there is the
03:07:33 22 remainder of the sentence that we just gave. Drop the
03:07:36 23 weapon or we will shoot.

03:07:39 24 Again, the question that's going to get to the
03:07:41 25 jury here, Your Honor, is whether or not their actions

03:07:47 1 qualifies as a meaningful opportunity to comply with the
03:07:52 2 directives in order to fall within the factors of Cole v.
03:07:57 3 Carson.

03:07:57 4 A jury could certainly see an importance in that
03:08:02 5 distinction. But they -- the law -- you know, since Graham
03:08:08 6 v. -- going -- going back to the '80s has been where
03:08:12 7 feasible, a warning should be provided. They did not
03:08:14 8 provide that warning.

03:08:16 9 THE COURT: Right. And so Mr. Noga tells us that
03:08:19 10 the law doesn't require it.

03:08:21 11 So is it the -- is it the limitation where
03:08:25 12 feasible or when feasible that makes it --

03:08:32 13 MR. MAGUIRE: Sure. And, again, I think it should
03:08:34 14 be a question for the jury in this case, whether it was
03:08:37 15 feasible to give that particular type of warning. I
03:08:40 16 don't -- I mean, the Court does not give a specific set of
03:08:44 17 words. And that's why we have juries, to make a
03:08:48 18 determination whether or not they have complied with the
03:08:52 19 spirit of the law dictated by the Supreme Court, which is
03:08:55 20 that where feasible, a warning must be given.

03:08:59 21 I have no doubt that he would argue before a jury
03:09:02 22 that it was not feasible to do so because of the rapidly
03:09:05 23 escalating circumstances. I think that's something that a
03:09:08 24 jury should decide for themselves.

03:09:10 25 THE COURT: Okay. And that's because you think

03:09:15 1 there are credibility determinations that need to be made
03:09:17 2 on the basis of the witness's testimony?

03:09:19 3 MR. MAGUIRE: I think that the citizens should be
03:09:21 4 able to look at -- should be informed of the law by
03:09:26 5 Your Honor as to what the requirements were. I'm sure that
03:09:28 6 would be after a very detailed charge conference, but one
03:09:32 7 of those factors that may end up before them is whether or
03:09:36 8 not they complied with the Fourth Amendment requirement to
03:09:39 9 provide a warning where feasible, and perhaps a specific
03:09:43 10 question may be presented to them.

03:09:44 11 I doubt it would -- I have very little experience
03:09:49 12 where that specific question has ended up in a verdict
03:09:51 13 sheet, but certainly that factor can be incorporated into a
03:09:55 14 charge and a question on a verdict sheet when they're
03:09:58 15 making the determination as to the big question of whether
03:10:01 16 or not the conduct and the use of force was reasonable.

03:10:05 17 THE COURT: Okay. Thank you, Mr. Maguire.

03:10:07 18 MR. MAGUIRE: Thank you, Your Honor.

03:10:10 19 MR. NOGA: May I respond, Your Honor?

03:10:15 20 THE COURT: Yes.

03:10:16 21 MR. NOGA: Thank you.

03:10:16 22 Your Honor, I will try to be brief and speak
03:10:19 23 slower, but a couple points.

03:10:22 24 The legal requirement -- the legal issue is not
03:10:25 25 whether he was given a meaningful opportunity to respond.

03:10:30 1 As a factual matter, and as the video shows, he was told to
03:10:34 2 drop the weapon. He did not do so. He was told by
03:10:37 3 multiple officers to do it. He had time to turn around and
03:10:41 4 go back in his house or try to get back in his house. If
03:10:44 5 he had time to do that, he had time to put the rifle down.
03:10:48 6 He didn't do that. But that's not the legal issue.

03:10:51 7 The legal issue is not -- the reason we have
03:10:55 8 qualified immunity is so a jury doesn't do 20/20 hindsight
03:10:59 9 from the comfort of a courtroom on life and death
03:11:03 10 situations when officers are put in danger. That's why the
03:11:07 11 issue is are the officers' actions based on an objectively
03:11:12 12 reasonable belief? That's -- the issue or what the jury
03:11:17 13 can decide -- I mean, that's the whole point. We can
03:11:19 14 anticipate it.

03:11:20 15 Everybody tries to take that route in a qualified
03:11:24 16 immunity case. Oh, let's see if we can convince some
03:11:27 17 strangers that, hey, what happened years ago in a yard with
03:11:30 18 a drunk, angry person brandishing a firearm in your face,
03:11:35 19 okay, let's see if that's an issue. It's not the legal
03:11:38 20 issue.

03:11:39 21 On Cole v. Carson, I'm just going to say that
03:11:42 22 Plaintiff's brief on Page 9, his response says: While this
03:11:45 23 case may not be directly on point -- referring to Cole --
03:11:50 24 because there's a question as to whether the decedent Cole
03:11:53 25 was explicitly aware of the police presence -- well,

03:11:57 1 there's more than that. It is not precisely on point.

03:12:00 2 Those cases that I cited to you, Judge, as the
03:12:04 3 prevailing law in the Fifth Circuit that I quoted saying
03:12:06 4 that we don't -- he doesn't have to be given a warning, he
03:12:10 5 doesn't have to point the gun, those were decided after
03:12:13 6 Cole v. Carson.

03:12:14 7 Cole v. Carson was based on disputed facts that
03:12:18 8 bear no resemblance to this case. Not only did you have
03:12:23 9 the conflict over whether the officers had changed their
03:12:27 10 testimony, and that Cole v. Carson had gone up to the
03:12:30 11 Supreme Court. It had been up and down on the Fifth
03:12:33 12 Circuit multiple times. It went to the U.S. Supreme Court.
03:12:36 13 That was sent back down, and the U.S. Supreme Court told
03:12:40 14 them comply with Mullenix. Apply the facts with
03:12:43 15 particularity. And then you finally had an en banc
03:12:46 16 hearing, and you have six dissents.

03:12:48 17 THE COURT: Did it go back to the District Court
03:12:51 18 before it went to the Fifth Circuit?

03:12:51 19 MR. NOGA: Yes, I believe so, Judge.

03:12:52 20 THE COURT: After the Supreme Court?

03:12:53 21 MR. NOGA: I believe -- I think it went to the
03:12:55 22 Fifth Circuit, then it went back down to the District, and
03:12:56 23 then it came back up.

03:12:57 24 And it's funny, Judge, there were so many
03:13:00 25 permutations on this, there were so many opinions on Cole

03:13:03 1 v. Carson before it went en banc, but you have a materially
03:13:06 2 different situation.

03:13:07 3 Number one, you did not have the bystander
03:13:10 4 standing nearby Kayla. And we're talking about facts.
03:13:14 5 What was a fact? Well, a fact was that she told the police
03:13:18 6 officer, Bristow, that she thought Carico was angry with
03:13:21 7 her, okay? That's a fact.

03:13:22 8 Number two, she was in proximity. And both
03:13:25 9 officers testified she was within his line of fire. He
03:13:27 10 could have swung on her easily. And they were concerned
03:13:30 11 about her as well as themselves. You did not have that
03:13:33 12 situation.

03:13:34 13 You also have a situation in Cole v. Carson, and
03:13:37 14 I'm familiar with the case, he walked out of bushes, and
03:13:40 15 there was a question of fact as to whether he was even
03:13:43 16 aware of police presence.

03:13:45 17 So that was part of the factor, too. And the
03:13:49 18 cases I read you, Judge, you look at Wilson v. Bastrop, you
03:13:57 19 look at Garza versus Briones. Both were decided after Cole
03:14:03 20 by the same Fifth Circuit. And in it, it says: We have
03:14:05 21 never required officers to wait until a Defendant turns
03:14:08 22 toward them with weapon in hand before applying deadly
03:14:10 23 force to ensure their safety. Plaintiffs identify no basis
03:14:14 24 for second-guessing an officer's split-second judgment. We
03:14:19 25 reject Plaintiff's argument that Johnson posed no threat

03:14:22 1 because he never actually aimed his gun at an officer.

03:14:25 2 Okay? They said the issue is the reasonableness
03:14:28 3 of the belief of the officer that he posed a serious
03:14:32 4 threat.

03:14:32 5 THE COURT: Is this the Wilson case --

03:14:33 6 MR. NOGA: Yes, Judge.

03:14:37 7 THE COURT: -- that cite?

03:14:38 8 MR. NOGA: Yeah, if you look at Footnote 3.

03:14:40 9 Footnote 3 in that case amplifies what they talked about in
03:14:45 10 the text. Wilson, that was decided in 2022. That's a
03:14:48 11 post -- post-Cole decision. And like -- Plaintiff is
03:14:50 12 honest, he says Cole is not directly on point. It's not.
03:14:53 13 You could not have Wilson. You could not have Garza. You
03:14:56 14 could not have Bazan ex rel./Hidalgo County, which we also
03:15:04 15 cite, you could not have those cases if the law was as
03:15:08 16 Plaintiff said it was. And these are post-Cole, the same
03:15:10 17 Fifth Circuit.

03:15:11 18 So the issue is not whether he had a meaningful
03:15:14 19 opportunity to respond. The issue is what the officer
03:15:17 20 perceived under the totality of the circumstances. You
03:15:20 21 talk about conduct. Plaintiff is trying -- Plaintiff's
03:15:23 22 attorney says: Well, there's no specific conduct. It's
03:15:26 23 all speculation. It's not speculation.

03:15:29 24 Here's -- here's conduct. Introducing a rifle
03:15:31 25 into the scene.

03:15:33 1 Here's conduct. Refusing to put it down when told
03:15:37 2 to.

03:15:37 3 Here's conduct. Having your finger on the
03:15:39 4 trigger.

03:15:40 5 Here's conduct. Turning towards -- away from the
03:15:42 6 officer going toward his house and turning toward Officer
03:15:46 7 McCraw.

03:15:46 8 Here's conduct. Telling his girlfriend he's angry
03:15:49 9 at her.

03:15:51 10 Okay? And it's not -- the specific conduct,
03:15:55 11 there's no case out there in the Fifth Circuit. And I've
03:15:58 12 20 something years argued these cases for cities and law
03:16:03 13 enforcement. I can't find a case that says, well, it's not
03:16:06 14 important what the officer thinks. You have to have
03:16:08 15 specific action. Every case is the contrary. It's what is
03:16:14 16 the officer's reasonable perception based on the
03:16:16 17 circumstances known to him. What does he see? What does
03:16:19 18 he know? It's not just the actions of the suspect.
03:16:23 19 There's no case that says that.

03:16:24 20 And, you know, the no meaningful opportunity to
03:16:31 21 respond, as I said, when you look at the video, he had
03:16:34 22 time -- if he had time to turn around and ignore the
03:16:38 23 officers and go into the house, he had time to put the gun
03:16:42 24 down. And there is no case -- no case -- even Plaintiff's
03:16:47 25 response, he puts in the Garner section saying: Well, you

03:16:50 1 should have a warning before deadly force is used where
03:16:55 2 feasible. That's not a fact question for the jury, okay?
03:16:59 3 There's no legal requirement. We are looking at officer's
03:17:02 4 conduct in this case based on clearly established law.
03:17:05 5 There is no clearly established law that says you can't
03:17:07 6 shoot at a person with a gun unless he -- unless you give
03:17:10 7 him this specific warning.

03:17:12 8 THE COURT: So let me ask you, is -- and I'm not
03:17:16 9 trying to be cute here. Is your -- is your quarrel with
03:17:23 10 Mr. Maguire's argument that the controlling authority
03:17:29 11 requires the denial of your motion for qualified immunity
03:17:34 12 because the officer did not give the Plaintiff a meaningful
03:17:38 13 opportunity to respond to directions to drop the weapon?
03:17:43 14 Is it because you don't think the law requires that or
03:17:46 15 because you believe on the facts here the officer did give
03:17:50 16 him that opportunity?

03:17:51 17 MR. NOGA: I will -- both. I don't believe that
03:17:55 18 the law requires that a specific warning be given. On the
03:17:59 19 facts given, when somebody's -- when an officer points a
03:18:03 20 gun at you and tells you to drop your weapon, I think the
03:18:05 21 implication that he can use that gun that he's taken out of
03:18:08 22 his holster is pretty clear. And I don't see -- there is
03:18:11 23 no case that requires a specific warning.

03:18:15 24 In the -- in the -- the Cole case, as we said, the
03:18:18 25 issue was whether he even was aware of a police presence.

03:18:22 1 Here there was no doubt there was a police presence.

03:18:24 2 And the other thing about Cole, as I said, you did
03:18:27 3 not have the bystander issue present, you didn't have the
03:18:29 4 complicating factors they were dealing with, with his
03:18:33 5 girlfriend in the yard. And --

03:18:34 6 THE COURT: Can I ask you?

03:18:36 7 MR. NOGA: Yes, sir.

03:18:36 8 THE COURT: Is the -- I mean, on the Cole case,
03:18:39 9 are you familiar -- how can I -- where can I find in the
03:18:44 10 record in Cole that there was not the bystander issue that
03:18:48 11 we have here?

03:18:49 12 MR. NOGA: Well, Judge, I got to be honest with
03:18:54 13 you, I have written papers on this. There's so many
03:18:58 14 opinions in Cole, I'm not quite sure -- I remember the
03:19:02 15 facts. I don't remember there ever being an issue raised,
03:19:06 16 a disputed question of fact. The officer -- the question
03:19:10 17 was, as I recall in Cole, did he shoot before giving any
03:19:17 18 warning, okay? There was a question -- well, besides the
03:19:19 19 fact that the lower Court had said they changed their
03:19:22 20 testimony and the stories were --

03:19:22 21 THE COURT: Right. I'm asking about who was
03:19:24 22 closest to the -- to Cole?

03:19:26 23 MR. NOGA: Well, he stepped out of some bushes,
03:19:30 24 and there were officers searching for him in the woods.

03:19:33 25 THE COURT: And I think it was -- the reference

03:19:35 1 was 10 to 20 feet away?

03:19:36 2 MR. NOGA: I believe so. I don't -- but, again, I
03:19:40 3 don't know if that was the reason the shot was fired
03:19:43 4 because the issue in Cole that the majority appeared to
03:19:48 5 focus on was whether there was even any kind of warning
03:19:52 6 given. A, was he aware of a police presence; B, did they
03:19:56 7 say anything before they shot? And I think that was part
03:19:58 8 of the problem with inconsistent testimony.

03:19:59 9 But as I pointed out, Judge, you could not have
03:20:03 10 Briones, you could not have Wilson v. Bastrop if Cole was
03:20:08 11 the way you say or whether my opposing counsel says it is,
03:20:12 12 you couldn't have that because you've got --

03:20:15 13 THE COURT: Because they would conflict with Cole?

03:20:18 14 MR. NOGA: Totally. You've got -- when Johnson
03:20:19 15 ran armed and disobeyed Green's commands to drop the gun,
03:20:22 16 his use of deadly force became justified. And because the
03:20:26 17 legal focus -- again, you know, all the cases in the Fifth
03:20:30 18 Circuit say this is quite factually intensive, all these
03:20:32 19 excessive force cases, that's why they have particularized
03:20:35 20 to the facts. But that's why we went through some length
03:20:39 21 through the deposition testimony. And it doesn't matter
03:20:41 22 where it comes from. It's not rebutted.

03:20:43 23 You asked properly whether there are any disputed
03:20:45 24 factual questions. There are not. Plaintiff did not
03:20:48 25 introduce anything undercutting the testimony of the

03:20:51 1 officers. The officers testified to tell their story
03:20:55 2 under -- under oath. They gave it. There's nothing before
03:20:58 3 you that undercuts that. Their testimony is consistent.
03:21:01 4 It fits the video, and the video is conclusive. And ever
03:21:05 5 since the Supreme Court case in Scott v. Harris, we know
03:21:08 6 that if there's any arguments of counsel, you look at the
03:21:11 7 video, and then you look and see what the witness said to
03:21:15 8 corroborate that video.

03:21:16 9 There's no dispute of fact. It's clear what
03:21:19 10 happened. But the problem is, is that for Plaintiff to
03:21:22 11 prevail, he's got to try to shift the legal focus from what
03:21:25 12 was in the minds of the officers that created the
03:21:29 13 indication that they thought there was an immediate threat
03:21:32 14 to the safety of themselves or others, and was that belief
03:21:36 15 reasonable?

03:21:36 16 Plaintiff has very little -- Plaintiff's
03:21:40 17 motivations have nothing to do with that. And when -- you
03:21:46 18 know, it's not meaningful warning. That's not an issue in
03:21:49 19 qualified immunity. It's not required. It's not a legal
03:21:52 20 issue. It's not a factual issue. It's not relevant to the
03:21:55 21 qualified immunity inquiry.

03:21:56 22 You know, and you asked about the facts in
03:21:58 23 Tennessee v. Garner. I'm familiar with those facts. That
03:22:02 24 was a case where a guy was running away from an officer, a
03:22:05 25 suspect. He wasn't armed. The officer shot him, and the

03:22:09 1 officer admitted he didn't think he was armed.

03:22:12 2 So there was no threat at all. This isn't a
03:22:15 3 case -- we've got a guy with a rifle here, a high-powered
03:22:19 4 308. In Garner, you've got a person running away who was
03:22:24 5 unarmed, and the officer said he didn't think he was armed,
03:22:28 6 and then he shot him.

03:22:28 7 Now -- and in terms of -- I do want to correct one
03:22:33 8 quick misstatement too. Officer Bristow testified when he
03:22:37 9 was asked by opposing counsel if you believe Mr. Carico had
03:22:39 10 committed a crime, he goes: Yeah, possibly. He left the
03:22:43 11 scene of the accident, possibly DUI.

03:22:46 12 And you asked about any evidence about the
03:22:47 13 intoxication. That's not rebutted. The perceptions of the
03:22:51 14 officers, again, on the statements and in the deposition
03:22:55 15 said they observed facts. They observed slurred speech.
03:23:01 16 Bristow said I could hardly tell what he -- understand what
03:23:03 17 he was saying at first. Glassy eyes, slurred speech,
03:23:08 18 erratic reactions. Both officers said they thought he was
03:23:10 19 intoxicated. Plus, he's coming from an accident scene
03:23:12 20 where a truck was rolled over, and it's Mr. Carico's truck,
03:23:16 21 okay, which he was looking at.

03:23:18 22 So he testified in his deposition, yeah, I could
03:23:21 23 have been looking at a crime. But you asked about the
03:23:23 24 Graham factors, and the Graham factors really don't come
03:23:27 25 into play in terms of calculating -- that's a whole

03:23:31 1 different analysis.

03:23:32 2 The relevancy is not, well, we're not looking
03:23:35 3 at -- are we arresting him for a particular crime? No.
03:23:38 4 This is a totality of circumstances, excessive force case
03:23:43 5 where the reasoning, the calculation, what you have to look
03:23:46 6 at, according to the law, is was the force used reasonable
03:23:51 7 under the circumstances, right? And the circumstances are
03:23:55 8 the objective reasonableness of the belief of the officer
03:24:00 9 and whether they had reason to believe he posed a threat.
03:24:04 10 And that's why it's a question of law.

03:24:06 11 I understand why opposing counsel wants to make it
03:24:09 12 a question of fact, but the reasonableness is measured at
03:24:12 13 the time of the incident. And it's measured from the
03:24:16 14 standpoint of what the officers knew or believed. And it
03:24:19 15 doesn't even have to be true. It's like those cases you
03:24:22 16 had where the shiny object the officer thought was a knife.
03:24:26 17 It wasn't.

03:24:26 18 It's like the Briones case or the Garza case I
03:24:30 19 read where they thought it was a gun, but it was a BB gun.
03:24:33 20 It doesn't even have to be true in that sense. It has to
03:24:37 21 be what the officers reasonably believed and whether that
03:24:41 22 was objectively reasonable to their mind to constitute a
03:24:46 23 threat.

03:24:46 24 And that really -- you know, the argument hasn't
03:24:50 25 changed on that. I mean, I'm looking at the other notes,

03:24:53 1 if you'll bear with me a minute, Judge, from what

03:24:57 2 Mr. Maguire testified to.

03:24:59 3 Again, none of the testimony of the officers was
03:25:03 4 contradicted. The video is -- is clear. He just keeps
03:25:09 5 saying, well, they shouldn't have used so much force. But
03:25:11 6 that's not the test, and it's not for the jury to second
03:25:14 7 guess. That's, again, why we have qualified immunity.

03:25:17 8 And the issue is when you look at the
03:25:20 9 circumstances and you look at the video and you look at the
03:25:23 10 factors that were articulated and it's not just
03:25:27 11 impressions, it's conduct, it's actions, it's observations
03:25:30 12 of the officers, when you look at that, did they have a
03:25:34 13 reasonable belief that they, Kayla Reger, or perhaps
03:25:40 14 somebody in the house that they didn't know was there or
03:25:42 15 not were in danger? Or did they have a reasonable belief
03:25:46 16 that this angry intoxicated person might take a potshot at
03:25:52 17 them through the window or from the house? Did they have a
03:25:55 18 reasonable belief that it was wrong to let this guy run
03:25:57 19 around with a rifle in his hand in his condition and that
03:26:01 20 by doing so, he posed a danger to themselves (sic) and
03:26:03 21 others? Was that objectively reasonable? That's a
03:26:07 22 question of law, and that's what we're asking the Court to
03:26:12 23 consider.

03:26:12 24 Thank you, Judge.

03:26:13 25 THE COURT: Thank you, Mr. Noga.

03:26:14 1 Mr. Maguire, could I ask you to address the
03:26:17 2 Salazar case? I meant to do that. I don't think you
03:26:21 3 addressed that. Salazar is the case that's cited in Cole
03:26:25 4 that refers to this idea about -- I'll just -- I'll just
03:26:32 5 read you -- I can cite you to the --

03:26:34 6 MR. MAGUIRE: Is this the case -- the crowd where
03:26:36 7 the guy exits a vehicle?

03:26:38 8 THE COURT: It's the -- it's the case -- I can
03:26:42 9 cite you to the -- in the Cole case, it's on Page 461. And
03:26:50 10 what it says is citing Salazar, which is 826 F.3d 272, a
03:26:58 11 Fifth Circuit case from 2016.

03:27:01 12 They say: This Court added, furthermore, in the
03:27:05 13 context of this case, it is immaterial whether Salazar
03:27:09 14 turned left, right, or at all before being shot.
03:27:13 15 Specifically, we've never required officers to wait until a
03:27:18 16 Defendant turns toward them with weapon in hand before
03:27:21 17 applying deadly force to ensure their safety.

03:27:26 18 MR. MAGUIRE: May I?

03:27:27 19 THE COURT: Yes, please.

03:27:27 20 MR. MAGUIRE: And, Your Honor, I thank you for
03:27:30 21 this question. It gives me an opportunity to address
03:27:33 22 Wilson, which counsel has referred to multiple times.

03:27:38 23 I think we've been sort of ignoring something very
03:27:43 24 obvious or we haven't had enough discussion about the
03:27:47 25 obviousness. Mr. Carico -- excuse me, Your Honor -- like

03:27:51 1 the individual in Cole v. Carson, had never threatened
03:27:57 2 anyone and specifically threatened themselves. There's a
03:28:00 3 question of whether or not they were suicidal.

03:28:04 4 And also, there's no dispute that his -- his back
03:28:09 5 was directly to the -- the officer at the time was shot.

03:28:15 6 So the -- the Plaintiff in Wilson -- one, this all
03:28:23 7 started -- police got involved because he and someone else
03:28:28 8 were brandishing weapons, and I think they -- they drew on
03:28:31 9 each other. So there was a threat to the community, and
03:28:33 10 they were a threat to each other, and that's how the police
03:28:36 11 first got involved.

03:28:37 12 The officer then pulled the individual over. He
03:28:42 13 hopped out with the pistol in his hand and an extended
03:28:47 14 clip, and he's running through the neighborhood, and he's
03:28:49 15 running to a school, and he eventually shoots at him, and
03:28:53 16 then the officer who ultimately kills him heard those shots
03:28:56 17 and then fired again.

03:28:57 18 So there's all these factors that have -- that are
03:29:00 19 nothing to -- and he, you know, plucks cleverly from this,
03:29:06 20 this freestanding proposition that, you know, an officer
03:29:08 21 can shoot and kill even if the -- even if the gun is never
03:29:12 22 raised in their direction.

03:29:13 23 Well, this was a person -- these are totally
03:29:16 24 different facts. And this is someone running around as a
03:29:19 25 threat to the community and shots had already been fired.

03:29:23 1 And more importantly, I want to remind the Court,
03:29:28 2 he never -- he never threatened -- he never threatened
03:29:32 3 himself with harm. All of his actions were directed
03:29:35 4 outwardly.

03:29:36 5 All of Mr. Carico's actions were directed towards
03:29:38 6 himself. That's what makes Cole unique, and that's why
03:29:42 7 it's clearly established as to Officer Bristow's use of
03:29:47 8 force because he found these specific factors that -- that
03:29:52 9 Mr. Carico, like the -- like the young man in Cole, only
03:29:56 10 threatened himself. And Mr. Carico, like the young man in
03:30:00 11 Cole, was not facing anywhere towards the officer at the
03:30:03 12 time that the discharge occurred.

03:30:05 13 So to compare -- to say that the holding in Wilson
03:30:12 14 could not stand because of the -- or if Cole didn't stand
03:30:17 15 for the proposition that I assert to the Court it does is
03:30:20 16 totally unrealistic.

03:30:22 17 And, Your Honor -- I'm sorry, could you -- I had
03:30:27 18 difficulty tracking --

03:30:27 19 THE COURT: The Salazar case.

03:30:28 20 MR. MAGUIRE: Yeah, I had difficulty, Your Honor,
03:30:30 21 finding in the --

03:30:32 22 THE COURT: Oh, okay. Page 467 of -- of Cole,
03:30:47 23 about midway down. I mean, that cites Salazar, which is,
03:30:57 24 you know, only a seven-year old case now.

03:31:00 25 MR. MAGUIRE: Sure.

03:31:00 1 THE COURT: We have never required officers to
03:31:02 2 wait until a Defendant turns toward them with weapon in
03:31:06 3 hand --

03:31:07 4 MR. MAGUIRE: Sure. And, Your Honor, I would love
03:31:09 5 to be given the opportunity to further brief after this
03:31:11 6 hearing why Salazar is dissimilar. I'm going to take a
03:31:14 7 guess for you right here. That's not a case about a guy
03:31:17 8 who only put a gun to his own head, and that's not a guy
03:31:20 9 who got shot in the center of his back. I don't know those
03:31:23 10 facts, but I'd like to be given the opportunity to draw
03:31:27 11 those distinctions.

03:31:28 12 THE COURT: Well, I mean, it's in -- it's in the
03:31:30 13 case that you cite as your best case.

03:31:33 14 MR. MAGUIRE: Understood. And there are hundreds
03:31:35 15 of cites within there, and I -- the Court's point is well
03:31:40 16 taken. But for this specific case, we have to look at the
03:31:49 17 really critical -- those two factors are extremely critical
03:31:53 18 here, right? That's -- that's why we're bringing this
03:31:57 19 challenge. That's why we're saying they don't have
03:31:59 20 qualified immunity.

03:31:59 21 If the facts were different than they were, I
03:32:02 22 would have sought out a different case to tell Your Honor
03:32:06 23 why it was clearly established that -- or I wouldn't have
03:32:10 24 taken the case, or I would have found something that said
03:32:16 25 it's -- why it's not clearly established that the officers

03:32:16 1 can't act in the way they did in this case.

03:32:18 2 THE COURT: Okay. Well, let me suggest this,
03:32:20 3 Mr. Maguire. Why don't -- why don't -- what is today, the
03:32:24 4 13th? Let me give you seven days to supplement with some
03:32:29 5 description of Salazar. That would be helpful.

03:32:32 6 MR. MAGUIRE: I appreciate it. And I'll limit it
03:32:34 7 to Your Honor's question.

03:32:36 8 THE COURT: Mr. Noga, seven days after that to
03:32:38 9 file some sort of a response.

03:32:40 10 MR. NOGA: Thank you, Your Honor.

03:32:40 11 THE COURT: Is that fair?

03:32:41 12 MR. NOGA: That's fair, Your Honor.

03:32:43 13 THE COURT: Okay. Anything else from either side?

03:32:44 14 MR. MAGUIRE: No, Your Honor. Thank you for your
03:32:46 15 time and attention.

03:32:47 16 THE COURT: Thanks very much. This is a
03:32:50 17 difficult, tragic case. I -- you know, I've spent a lot of
03:32:55 18 time on it already, I will tell you, and I want to get it
03:33:00 19 right.

03:33:02 20 So, Mr. Maguire, if you'll, you know, provide some
03:33:06 21 supplemental authority.

03:33:10 22 And, Mr. Noga, if you want to respond to that,
03:33:13 23 that would be helpful.

03:33:14 24 Obviously, depending on how I rule on this issue,
03:33:17 25 if -- if I deny it, that, of course, is appealable on an

03:33:24 1 interlocutory basis. If I grant it, obviously it becomes
03:33:28 2 finally appealable. And whichever way I determine is the
03:33:34 3 correct outcome, you know, I think, you know, either side
03:33:44 4 should strongly consider taking it up to make sure I've
03:33:47 5 gotten it right.

03:33:48 6 MR. MAGUIRE: I appreciate that, Your Honor.

03:33:51 7 MR. NOGA: Thank you, Your Honor.

03:33:52 8 THE COURT: Appreciate you very much.

03:33:53 9 Thanks -- thanks to all of you for being here.

03:33:56 10 COURT SECURITY OFFICER: All rise.

11 (Hearing concluded at 3:34 p.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
CERTIFIED SHORTHAND REPORTER
State of Texas No.: 7804
Expiration Date: 10/31/2025

9/18/2024
Date